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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NANCY ANONSEN and MICHAEL ANONSEN, individually and as next friends of WILLIAM BOOHER, Jr.,

Petitioners,

v.

PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLOW, KTRK, INC. D/B/A KTRK-TV, and MIRIAM BOOHER,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

PETITION FOR A WRIT OF CERTIORARI

DAVID H. BERG
Counsel of Record
Berg and Androphy
3704 Travis
Houston, TX 77002
713-524-5622

PHILIP D. ZELIKOW
79 J.F.K. Street
Cambridge, MA 02138
Counsel for Petitioners

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

QUESTION PRESENTED

Whether the First Amendment can confer absolute protection from civil liability as a matter of law for both the disclosure and the broadcast of painful, intimate information where the information was not publicly available or a matter of public record, the victim was not a public figure, the private discloser had pledged confidentiality, and the broadcaster acquired the information without the victim's consent.

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PETITION FOR A WRIT OF CERTIORARI

Nancy Anonsen, Michael Anonsen, and William Booher, Jr. respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals for the First District of Texas in this case.

OPINION BELOW

The opinion of the court of appeals (App. B, *infra*, 5a - 18a) is reported at 857 S.W.2d 700. The trial court order granting summary judgment (App. A, *infra*, 1a-2a) and the Supreme Court of Texas denial of the application for a writ of error (App. C, *infra*, 19a-20a) and order refusing rehearing on its earlier denial (App. C, *infra*, 22a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 3, 1993. Petitioners' application for a writ of error to the Supreme Court of Texas was denied on November 17, 1993. Petitioners' motion for rehearing was denied on January 5, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part, that "Congress shall make no law ... abridging the freedom of speech, or of the press...."

The Fourteenth Amendment to the Constitution provides, in relevant part, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...."

Relevant provisions of former sections of the Arkansas Code are reproduced in Appendix C, page 23a-24a.

STATEMENT

A. The Invasion of Privacy

The essential facts of the case are undisputed. Also, since the case arose from appeal of a summary judgment, the Texas court acknowledged that all of petitioners' factual assertions must be accepted as true. 857 S.W.2d at 702.

On January 5, 1989 respondent Miriam Booher (hereinafter referred to as Booher) appeared on the

"Donahue" television show hosted by respondent Phil Donahue and produced by respondent Jose Pretlow for their corporate employers, respondents Multimedia Entertainment, Inc. and Multimedia, Inc. For convenience, all the respondents associated with the show will be referred to in this petition as "Donahue." Respondent KTRK, Inc. d/b/a KTRK-TV was the local station which carried the show in the Houston-Galveston area.

The show's topic for the day was "Forbidden Pregnancies." Booher did not appear to tell about her own forbidden pregnancy. Instead she recounted what happened to her daughter. Her daughter, petitioner Nancy Anonsen, was raped by her stepfather, Booher's husband, seventeen years earlier, when the girl was only eleven years old. Nancy had borne a child from this incest. Booher had helped conceal the crime.

This incestuous rape occurred in 1972. Booher, though she soon learned the truth of what happened to her daughter, never reported the matter to authorities. She remained married to her husband and raised her daughter's child as if he was an adopted half-brother. The daughter and the child left the household after the daughter came of age. The daughter still cares for her son and represents his interests in this proceeding.

In 1988 Booher's husband left her and filed for divorce. Angry, Booher decided to use the crime her husband had committed against her daughter as a way of getting back at her husband. Greed was also a factor. As the Texas court observed, "Booher was motivated by revenge and the desire to sell a book about her life." 857 S.W.2d at 702. Once again, her daughter was the pawn. So Booher wrote a letter about the rape of her daughter and sent it to four television shows: Oprah; Morton Downey, Jr.; Geraldo; and Donahue. Only Donahue's producer replied.

Donahue admitted that at the time of his show on "Forbidden Pregnancies" he was sensationalizing his programs because of the competition for ratings. (Tr. 120, 226, 230-33). Though Booher bragged she could get others in her family to appear, this was false. It was clear well before air time that in fact only Booher would appear. No one associated with Donahue thought this odd or attempted to contact anyone except Booher.

Booher appeared on Donahue without disguise and used her own full name as she told what had happened to her daughter. From time to time the caption "Daughter Had Husband's Baby" appeared on the screen as Booher spoke. By disclosing her own identity, Booher effectively and immediately disclosed the names of her daughter and her daughter's child from the rape. 857 S.W.2d at 702.

The consequences for Anonsen and her son were instantaneous and severe. Once more the victim of parental abuse, the daughter first learned of the broadcast from her husband. She was "embarrassed, humiliated, paranoid and couldn't function in any way" after the show aired. (Tr. 1273). Her marriage broke apart and, despite marital counseling, she and her husband divorced six months after the broadcast. Her son, then 16 years old, began experiencing harassment from his high school classmates, who mocked him as a "bastard." He had to transfer to another school to escape the harassment. Both mother and son began receiving medical treatment for the trauma. (Tr. 1270, 1352).

The broadcast was so traumatic because Booher was disclosing a closely held family secret. Petitioners testified that the rape had been kept secret from everyone except a few friends and family members. (Tr. 217, 218, 1262). The matter was never a part of any public record. The biological child of the rape, William Booher, Jr., had only been told the truth in 1987, when he was fourteen years old.

Miriam Booher, by disclosing the story on national television, violated her own repeated and express pledges of confidentiality to petitioners. When Booher told Nancy she was talking to Donahue, her daughter pleaded with her not to do it. "Too many people will get hurt." Booher agreed not to appear. Booher then assured her daughter she had called Donahue's producer to tell him she, Booher, would not go on the show. (Tr. 1261). Her assurance was untrue.

Donahue, in broadcasting Booher's disclosure, violated his own customary practices. Donahue, designated by respondents as an expert on his industry, said he often concealed identities to protect people. Identities of callers were concealed every day. Some guests are disguised, and can still move audiences to tears. (Tr. 102-04, 133). Donahue said he had done many shows about rape. But he said he had never revealed the identity of a rape victim without first obtaining the victim's permission. (Tr. 57, 258). Such a failure to obtain the victim's permission would, he conceded, amount to an invasion of privacy. (Tr. 259).

Respondents concede that neither Donahue nor his staff obtained or attempted to obtain petitioners' consent for the acquisition of the information from Booher or their broadcast of her disclosures. They never tried to contact petitioners at all. Nor was any attempt made to conceal Booher's identity in order to protect petitioners.

Petitioners sued Booher, Donahue, Donahue's producer, and Donahue's corporate employers for invasion of privacy, under the common law tort for public disclosure of private facts. This tort has long been accepted in Texas and many other states. Petitioners also sued for the intentional infliction of emotional distress.

B. Proceedings Below

After suit was brought and depositions taken, respondents moved for summary judgment under the First

Amendment and on state law grounds. The 56th district court for Galveston County, Texas, granted the motion. Petitioners appealed to the court of appeals. The court of appeals affirmed the judgment, relying solely on its analysis of the federal claim under the First Amendment, as applied to the states under the Fourteenth. Petitioners applied for a writ of error from the Supreme Court of Texas. The application was denied without any opinion on the merits of the case. Motion for rehearing to the Supreme Court was denied. Since it was the highest state court which actually ruled on the merits, this petition for certiorari seeks relief from the ruling of the court of appeals. *Faretta v. California*, 422 U.S. 806, 812 (1975).

C. Federal Question Was Basis for State Court Decision

The court of appeals held that while the motions had addressed a variety of state law issues, the appeal would be disposed of based on the court's analysis of respondents' claim of First Amendment protection. 857 S.W.2d at 703. No other issues were considered. No state constitutional provisions were invoked. The Texas Supreme Court gave no reason for refusing discretionary review. Since the state court has held that a federal question is properly before it and has proceeded to consider and dispose of that issue, this Court's concern about the proper raising of the federal question in the state courts has disappeared. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979).

REASONS FOR GRANTING THE PETITION

I. THE FIRST AMENDMENT PRIVILEGE UPHELD IN TEXAS IS ABSOLUTE, IN CONFLICT WITH THIS COURT'S HOLDING IN *FLORIDA STAR v. B.J.F.*

The Texas court has eliminated the tort of public disclosure of private facts by erroneously granting the discloser an unlimited First Amendment right and then equating the broadcaster's rights with those of the discloser. This Court's narrower test for balancing First Amendment interests, laid out in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), was not applied by the Texas court.

A. The Texas Court's Language Is Unlimited.

1. The court predicated its holding for both Donahue and Booher on Booher's unlimited First Amendment right to disclose.

The Texas court's ruling hinges on the belief that the decisive issue is Booher's right to disclose. The question, it said, is "whether a person's right to make public the most private details of their own life is limited when the information also reveals painful intimacies of other persons. We find that it is not." The discloser's right is therefore unlimited, so long as the disclosure has to do with the details of the discloser's life.

2. But Booher's speech alone, without Donahue's publication of it, had no First Amendment protection

(a) Booher was not sued just for revealing her identity

Since the public is interested in rape, incest, and as Donahue's show put it, "forbidden pregnancies," the Texas court thought the only other First Amendment question was whether Booher could reveal her own identity. 857 S.W.2d at 704. Yet if Booher had gone on the Donahue show just to say her name, she would not have been allowed on the air

and there would have been no lawsuit. To be liable, Booher had to both identify herself, thereby identifying her daughter and her daughter's son, *and* she had to disclose that her daughter had been the victim of her husband's abuse, abuse to which she was a criminal accessory. Had she only done one of these two things, without the other, she would not have invaded petitioners' privacy and inflicted emotional distress. So while Booher may have a right to say her name, the question remains whether she had a constitutional right to link her identity to the account of how her daughter was raped.

(b) private speech and the law of torts

The Texas court relied completely on Booher's right to tell about events in which she was involved. This is, in essence, a contention that the First Amendment immunizes speech from civil liability if the speaker is recounting a personal experience. This is a startling premise, since lawsuits throughout the country have long held individuals liable if their private speech breaches a legal duty to another. This certainly includes speech about their own experiences, as in most confidentiality cases. In *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991) this Court held that an attorney could be disciplined for extrajudicial statements to the press, above and beyond other obligations of confidentiality. 111 S.Ct. at 2733-36. Businessmen are barred from disclosing trade secrets they learned in their employment. Parties to lawsuits can be barred from disclosing the terms of a settlement. Hospitals can be held liable for improperly revealing the names of individuals who have tested HIV-positive.

So the First Amendment has never provided unlimited protection if the speech violated a common law legal duty. The key issue in this case is whether Booher owed such a duty to petitioners. But that is an issue for state law and for

a jury; its resolution is not dictated as a matter of law by the First Amendment.

The distinction between protected speech and private speech is not new to this Court. Though the holding of the Texas court in this case is a novel one, the Court has dealt with claims that public employees have been dismissed for their speech. In such cases the Court has distinguished between public and private speech, pointing out that the First Amendment's goal is "the full protection of speech upon issues of public concern," such as the conduct of government agencies or public persons. *Connick v. Myers*, 461 U.S. 138, 154 (1983).

In sum, Booher and Donahue actually have quite different positions under the First Amendment. Booher, as a private person handing out newsletters about her daughter, would have had no constitutional protection. This is doubly true, because she expressly waived any right to disclose.

(c) waiver of First Amendment rights by pledging confidentiality

Yet even if Booher had some First Amendment right to tell about what she and her husband did to their daughter, she certainly waived that right by pledging not to disclose the information. First Amendment rights can be waived. *Rust v. Sullivan*, 111 S.Ct. 1759, 1775 (1991). They can, specifically, be waived by a pledge of confidentiality, as this Court held in *Cohen v. Cowles Media Co.*, 111 S.Ct. 2513, 2519 (1991). A news source sued a newspaper for breaking the promise to conceal his identity. Despite the public interest served by revealing the source's identity, this Court concluded that if there has been an agreement of confidentiality, "any restrictions which may be placed on the publication of truthful information are self-imposed." The press had no constitutional right to disregard promises enforceable under state law. *Id.*

Petitioner testified that just such pledges existed in this case. Her testimony must be accepted as true for the purposes of a summary judgment. Booher promised to keep the secret, and specifically agreed that she would not appear on the Donahue show. She had no First Amendment right to break that promise.[1]

3. The Texas court erroneously conflated Booher's supposed rights with Donahue's First Amendment claim, creating an unlimited privilege.

Petitioners have shown that Booher and Donahue had quite different protections under the First Amendment. If Booher had publicized her allegations without any help from Donahue, she would have had no constitutional protection at all. On the other hand, Donahue does have a First Amendment right to be considered. But the Texas court never analyzed Donahue's rights. It wrongly assumed that Booher's alleged right to disclose settled the case. Therefore the court did not decide, for example, whether the broadcast was newsworthy because, it said, "we do not believe that the issue of newsworthiness ... is relevant to the ultimate inquiry before us: whether Booher had the right to reveal her own identity." 857 S.W.2d at 705.

Donahue is liable for quite different reasons. Even if Booher had a right to disclose, Donahue would not necessarily have the right to broadcast her disclosure to millions of people. Donahue's rights are subject to the tests

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[1] Incidentally, the existence of the confidentiality agreement and related waiver is alone sufficient to distinguish the two cases relied upon by the Texas court, *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980); *Dresbach v. Doubleday & Co., Inc.*, 518 F. Supp. 1285 (D.D.C. 1981). Nothing in either of these opinions suggests that the discloser had expressly agreed to keep the matters secret and then violated the pledge.

under *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), discussed below.

Petitioners only pause here to call the Court's attention to the extraordinary result of fusing Booher's supposed rights with those of Donahue. A new and extremely broad First Amendment privilege has been created. Since Booher's identity was coupled with an account of her "personal" experience, and since all this was thereby privileged, the court creates an unlimited First Amendment right to disclose anything one has personally learned or experienced. Then it considers any question of press rights disposed of by the discloser's right. Thus the court apparently holds that any disclosure of any firsthand knowledge about anyone can be published with full First Amendment immunity for both discloser and publisher.

B. The Effect of the Texas Court's Decision Is Unlimited.

This reading of the nominal scope of the Texas court's decision is reinforced by consideration of its practical effect. The right to disclose is being given to one of the victimizers, not the victim. The only other test, "public concern," is defined in a way that will be met in every conceivable case.

1. The disclosure right was granted to a victimizer, not the victim.

If criminals have a First Amendment right to disclose how they harmed their victims, then the right of disclosure has no discernible boundary. Though the court called Booher one of the "victims of the family tragedy of incest," 857 S.W.2d at 705, the law is less generous. The acts done to the daughter by her stepfather were more than a tragedy; they were felonies, chargeable as rape, carnal abuse, or

incest, under the Arkansas law defining those offense in 1972. See *Ark. Stat.* § 41-811 & 41-812 (incest), 41-3401 (rape), 41-3406 (carnal abuse) (Bobbs Merrill 1964, repealed 1975); *Allen v. State*, 488 S.W.2d 712 (Ark. 1973); *Hicks v. State*, 243 S.W.2d 372 (Ark. 1951).

Booher was an accessory after the fact to these crimes. Despite her legal duty to protect her daughter, she joined in concealing the offense from the authorities. Both in 1972 and now, accessories after the fact were and are punished in Arkansas. Given the seriousness of the offenses being concealed, Booher could conceivably have been charged with a felony. See *Ark. Stat.* § 41-3404 (accessories "before or after the fact to the crime of rape"), 41-120 (accessory after the fact) (Bobbs Merrill 1964, repealed 1975); see also current *Ark. Code Ann.* § 5-54-105 (hindering apprehension or prosecution) (Michie 1993); *Tyler v. State*, 581 S.W.2d 328, 332 (Ark. 1979) (en banc) (discussing both previous and current law).

There was a real victim of these crimes, and it was Nancy Anonsen. As Booher sought revenge against her ex-husband and a book contract, Nancy became the victim yet again, but her agony this time was shared by her son. Giving Booher a First Amendment privilege to reinjure her victim places no sensible limit on the privilege, and it is unconscionable.

2. The definition of "public concern" is circular and unbounded.

The Texas court held that Booher's disclosure was constitutionally protected because the "show's general subjects, incest, rape" were newsworthy. 857 S.W.2d at 704. It then held that the newsworthiness privilege might not cover the specific information identifying petitioners, but this was irrelevant because Booher had an unlimited constitutional right to disclose information about her experiences.

Petitioners have already addressed the issue of Booher's supposed rights. To show why the Texas court's privilege is in practice absolute, we simply add here that the first part of its test, the finding of interest in the general subject will be met in every single case.

First, the Texas court comments that "the privilege to discuss matters of public interest extends to information concerning interesting phases of human activity." 857 S.W.2d at 703. Second, the opinion leaves no doubt that if the activity was not interesting, it would not be in the media. So the definition is circular. We can see the topic was interesting, because it was in the press or on TV. Donahue, like much of the media, believes it only broadcasts about topics that are or should be interesting. Rape is interesting. So are pregnancies. So is AIDS, and it would be interesting to hear which people are actually HIV-positive. There is definite interest in the secret details of the out-of-court settlement of a big lawsuit, or what some criminal defendant might have confided to his attorney.

This syllogism becomes a serious problem for this Court because the Texas court's opinion uses it as the First Amendment umbrella for Booher's unlimited disclosure right. Major premise: discussion of all topics of public interest is constitutionally protected. Minor premise: Booher disclosed on a topic of public interest. Conclusion: Booher's speech is constitutionally protected. Since we see that the major premise, the umbrella, covers practically any imaginable topic, the constitutional privilege extends to practically any disclosure.

We are thus presented with the very danger Judge Merrill warned of in *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976):

> To hold that privilege extends to all true statements would seem to deny the existence of 'private' facts, for if facts be facts -- that is, if they be true -- they

> would not (at least to the press) be private, and the press would be free to publicize them to the extent it sees fit. The extent to which areas of privacy continue to exist, then, would appear to be based not on rights bestowed by law but on the taste and discretion of the press. We cannot accept this result.

527 F.2d at 1128.

The Texas decision creates, both on its face and in practical effect, an absolute First Amendment privilege that would practically eliminate not only the tort of public disclosure of private facts, but also cut a swath through many other common law torts, such as breach of confidentiality, and limit a broad array of oft-used government and judicial powers to regulate disclosure of private information.

C. This Court Has Expressly Rejected Such An Unlimited Privilege.

In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) a Sheriff's Department posted the name of a rape victim who had just reported the crime in its press room. The newspaper ran the story in its police blotter section with the victim's name. Florida had a statute which made it unlawful to "print, publish, or broadcast" the name of the victim of a sexual offense. The victim sued the Sheriff's Department and the newspaper. The Department settled; the newspaper was found liable. The Supreme Court ultimately reversed the finding, holding that the newspaper's action was protected by the First Amendment.

This Court began by admitting that its prior decisions had not "exhaustively considered" the conflict between reporting of truthful information and protections of privacy, a "somewhat uncharted" area of the law. 491 U.S. at 530, 530 n.5. Appellant Florida Star urged the court to base its holding on *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) and hold that the press may never be punished for publishing

the truth. Appellee B.J.F. asked the court for an equally categorical ruling, that publishing the name of a rape victim could never enjoy constitutional protection. This Court declined both invitations.

Instead this Court chose to follow *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) and adopt a narrower holding which would acknowledge the ongoing need to balance First Amendment interests with those of privacy. "We continue to believe that the sensitivity and significance of the clashes presented in clashes between First Amendment rights and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." 491 U.S. at 533.

This Court took care not to "rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these [privacy] interests as to satisfy the *Daily Mail* standard." 491 U.S. at 537. This Court warned other courts that, "Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual ...." 491 U.S. at 541. Other courts heard the warning. "The Court [in *Florida Star*] expressly recognized that individuals maintain a privacy interest even in true facts that must be weighed against the societal interest in free expression." *Reuber v. Food Chemical News*, 899 F.2d 271, 285 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2814 (1991).

But the Texas court, by giving the discloser an unlimited constitutional right, by allowing victimizers as well as victims to claim this right, and by treating the discloser's right as dispositive for the broadcaster as identical, has fashioned just the sweeping holding this Court warned against. It is difficult to imagine how, in practice, any significant zone of personal privacy can remain protected against such a privilege.

The Texas court did not apply the tests offered by this Court in *Florida Star*. Indeed, the Texas court did not even cite this Court's decision.

The dissenters in *Florida Star* pronounced that, "Today, we hit the bottom of the slippery slope." 491 U.S. at 547 (White, J., dissenting). Unfortunately, they were wrong. New depths have been dredged. This case is an illustration of how the media organization can fail the tests elaborated in *Florida Star*.

II. NONE OF THE *FLORIDA STAR* TESTS WERE PASSED BY BOOHER AND DONAHUE.

Florida Star v. B.J.F. bases its holding on the *Daily Mail* principle that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 443 U.S. at 103, quoted in *Florida Star*, 491 U.S. at 533. For the press conduct, this Court itemized three considerations in applying this principle, along with a separate examination of the state interest.

Petitioners will examine each of these three considerations, and the way in which the state interest was tailored to the problem. This Court has implied that *all three* of these tests must be passed by the publisher. Otherwise the *Daily Mail* principle would need to be amended. In this case, none of them were passed by Donahue or Booher.

A. The Information Was Not Lawfully Acquired.

"First," the principle only protects the publication of information which has been "lawfully obtained." 491 U.S. at 534. This includes the question of consent, so critical to this case. "To the extent sensitive information rests in private hands, the government may under some

circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Id.*

1. Booher's disclosure to Donahue was unlawful.

Booher's disclosure to Donahue unlawfully breached a legal duty owed to petitioners, both in general and because of her express pledge of confidentiality. The common law tort of invasion of privacy through disclosure of private facts had long been recognized in Texas. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 682-84 (Tex. 1976). Texas also recognizes the tort of intentional infliction of emotional distress through speech. *Tidelands Automobile Club v. Walters*, 699 S.W.2d 939, 942-44 (Tex. Ct. App., 1985). *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649, 652-54 (Tex. 1987). Publicity is an element of the invasion of privacy tort, but the unlawful conduct was complete by Booher's actions alone, before Donahue broadcast her disclosure, both because the publicity was foreseeable and because (unlike defamation) publicity can be accomplished without publication. *Industrial Foundation*, 540 S.W.2d at 683.

2. Donahue's acquisition of the information was "nonconsensual."

As noted above, this Court expressly flagged the danger to a publisher of "nonconsensual acquisition" of information in private hands. Donahue did not obtain, or attempt to obtain, petitioners consent for the broadcast of Booher's disclosure. This was a violation of his own practice for invariably obtaining the rape victim's consent before disclosing the victim's identity.

Donahue may now argue, though, that he had Booher's consent. It was immaterial. Booher's privacy was not in need of protection.

In *Florida Star* the victim voluntarily disclosed the offense to the government. The government then disclosed the information to the press. But here, Booher was not telling the story of a crime committed against her. She was telling the story of a crime committed, many years earlier, against her daughter, a crime which she helped conceal.

When this Court referred to "nonconsensual acquisition," it can only have been writing of the consent of those with the expectation of privacy, the persons whose privacy interests the law seeks to protect. In this case, they are petitioners, not Booher. "In an organized society, there are few facts that are not at one time or another divulged to another ... information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons; not freely available to the public.'" *U.S. Department of Justice v. Reporters Committee*, 489 U.S. 749, 763-64 (1989)(quoting Webster's Third New International Dictionary). It would be odd indeed to find, in this case, that the victim's expectation of privacy can be waived by one of the victimizers.

B. The Information Was Not Publicly Available.

A second consideration in *Florida Star* was that "punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." 491 U.S. at 535. In *Florida Star* the government had "made certain information publicly available." *Id.* That was not the case here (or in *Reuber v. Food Chemical News*, 899 F.2d at 285).

The term "publicly available" is relatively narrow. It does not, for instance, include depositions in a judicial

proceeding. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 (1984). Yet the facts here do not require the drawing of fine lines. No one ever reported the rape of 11 year-old Nancy Anonsen to public authorities, in 1972 or later. It was never a matter of public record.

C. The Public Interest Against "Timidity and Self-Censorship" Was Not At Risk.

"A third and final consideration is the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing certain truthful information." *Florida Star*, 491 U.S. at 535. The application of this test in *Florida Star* can readily be distinguished from the facts of this case. Since the disclosure came from the government, this Court wanted to let the media rely on the government and not have to sift through public reports to "prune out material arguably unlawful for publication." 491 U.S. at 536. That situation is obviously not presented here. But there are three additional reasons why the public interest which properly concerned the Court was not at risk in this case.

1. Identification of the victim, who was not a public figure, had no "public significance."

The crime cannot be said to have retained "public significance" by 1988, "in the sense in which the *Daily Mail* synthesis of prior cases used that term." *Florida Star*, 491 U.S. at 536. This Court defined the term precisely: "That is, the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation of a violent crime which had been reported to authorities." *Id.*

In this case, no crime had been reported to authorities. None was being investigated. No investigation

was possible; the statute of limitations had expired in 1975. For offenses committed in Arkansas before 1976, when a new code was adopted, the statute of limitations for all felonies except murder was three years. *Ark. Stat.* § 43-1602 (Bobbs Merrill 1964, repealed 1975).

2. Despite some overlap, the contours of constitutional interests in newsworthiness are not synonymous with "ratingsworthiness" and "infotainment."

The *Florida Star* holding, by following *Daily Mail* rather than *Cox Broadcasting*, no longer treats the First Amendment question in private facts cases simply as a definition of the "newsworthiness" privilege. "Newsworthiness" remains an important factor, however, in evaluating the Court's required inquiry into the risk of "timidity and self-censorship" presented by the punishment of media behavior.

The Donahue show is not a news program produced by a news organization. Donahue and his corporate employers are in the business of providing a product which mixes information with entertainment. This does not mean Donahue has no First Amendment rights. He does. But his producers and editors are not applying the criteria of "newsworthiness" to their product. They are applying other criteria, which may overlap with "newsworthiness" but are not identical with it. Therefore the First Amendment interests at issue in this case must be evaluated with special care.

The traditional rule has been that newsworthiness ends and liability begins when the "publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake...." Restatement (Second) of the Law of Torts, § 652D, comment h (1977). It is hard to imagine any case offering a better example of "morbid and sensational

prying into private lives for its own sake" than this one. Booher detailed the long-past incestuous rape of her daughter; a caption ran underneath highlighting "Daughter Had Husband's Baby," all on a program with the topic of "Forbidden Pregnancies." For even milder examples held liable or sent to the jury, see, e.g., *Virgil v. Time Inc.* 527 F.2d at 1128 (profile of body surfer); *Huskey v. NBC*, 632 F.Supp. 1282, 1289 (N.D. Ill. 1986)(film showing man's tattoo); *McCabe v. Village Voice, Inc.*, 550 F.Supp. 525, 529-30 (E.D. Pa. 1982)(nude photo without consent); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 771-73 (Cal. Ct. App. 1983)(local college president's sex-change operation).

Newsworthiness is clearly not synonymous with omnipresent public interest. In *Reuber v. Food Chemical News*, the court found some legitimate public interest in the subject of a letter circulated about Reuber, on the quality of his cancer research. But the privacy interest was strong enough to require that the issue of liability be given to the jury. 899 F.2d at 284-85. Another case decided after this Court's holding in *Florida Star* was *Y.G. v. Jewish Hospital*, 795 S.W.2d 488 (Mo. Ct. App. 1990). The hospital was sued for disclosing information about plaintiffs' in vitro fertilization. Despite acknowledging undeniable public interest in the subject, the court considered sexual, procreative, and medical treatment matters essentially private and considered then not to be newsworthy if (a) they were not the subject of a legal action or activity of police or other public officials; or (b) did not occur in public view. The disclosure was held not newsworthy as a matter of law. 795 S.W.2d at 499-501.

The danger of "timidity and self-censorship" is especially reduced in this case because Donahue could have avoided liability and still let Booher talk about her daughter. He had the option of concealing Booher's identity. He

admitted in his deposition that he had often used this practice in the past, and said that such stories could still move him and his audience to tears.

Donahue also cannot claim that by disclosing a victim's identity against her will, he was doing a public service. Aside from studies showing that most public disclosures of rape victim identity reinforce rather than dispel sexual assault stereotypes, the fundamental question is "why must the victim, who has already suffered from the ordeal of rape, be forced to bear the responsibility of educating society...?" Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 *S.Calif.L.Rev.* 1019, 1033 (1991). Eighty-four percent of the American public agreed in a survey that the identity of rape victims should be kept out of news stories unless the victim agrees to disclosure. *Id.* at 1034.

If Donahue is held liable for cavalierly damaging this victim's life and the life of her child, when identifying her was little more than "morbid and sensitive prying," there is no risk of inducing "timidity." The opposite danger is far greater. If the Constitution immunizes Donahue from accountability for such conduct, the standard for proper press behavior is redefined and lowered.

Traditional news organizations, competing against "infotainment," are already fighting the temptation to lower their ethical standards for finding and presenting news. As the managing editor and co-anchor of CBS Evening News and anchor of its "48 Hours" program recently wrote (discussing checkbook journalism):

> Part of the allure of lowered standards is the success of the syndicated magazine shows. They're sensationalized, dramatized, Hollywoodized. They also cost little and perform well in the ratings. These shows don't apply traditional hard-news standards ... I doubt most even think about hard-news standards.

> Too many of us in hard news, with the wolf at the door and the bean counter's breath down our necks, are looking for that extra tenth of a ratings point, envying the success of the syndicated magazines. ... If we keep blurring the distinctions and standards between news and entertainment, we're all going to have to pay.

Dan Rather, *Letter to the Editor*, N.Y. Times, March 8, 1994, at A20.

3. This common law action presents a different "state action" problem than the statutory prohibitions at issue in *Florida Star* and *Daily Mail*.

The risk of inducing "timidity and self-censorship" is further minimized in this case because the Court is not being asked to uphold a categorical statutory prohibition. Instead the Court is asked only to sustain the application of common law legal duties where the individuals involved define the circumstances of their liability. In *Cohen v. Cowles Media Corp.* this Court distinguished *Florida Star* and *Daily Mail* by observing that in those cases "the State itself defined the content of publications that will trigger liability. ... Here, by contrast, Minnesota law simply requires those making promises to keep them." 111 S.Ct. at 2519; see also *McSurely v. McClellan*, 753 F.2d 88, 112 (D.C. Cir.), *cert. denied*, 474 U.S. 1005 (1985)(upholding common law invasion of privacy action against congressional investigators).

D. Petitioners Fully Satisfied The Court's (and Justice Scalia's) Tests for Tailoring the Protection of State Interests.

Even if the press conduct had met the three tests which flow from the *Daily Mail* principle, this Court also acknowledged there could be a need to balance constitutional interests in free expression with "a need to further a state interest of the highest order." *Daily Mail*, 443 U.S. at 103, quoted in *Florida Star*, 491 U.S. at 533. It is "undeniable" that the interests underlying protections for victims of sexual offenses "are highly significant interests." *Florida Star*, 491 U.S. at 537. But the statute at issue in *Florida Star* was not properly tailored to protect these interests while respecting First Amendment concerns, for three reasons, none of which are present here.

1. The information was not disclosed by the government.

This Court, in *Florida Star*, was strongly influenced by the fact that the government had disclosed the information and now sought to punish its publication. The government, the Court noted, could have simply restricted the dissemination of the information. 491 U.S. at 538. In this case neither the government nor petitioners were responsible for the disclosure.

2. The tort does not create negligence per se.

The Florida law was faulted for "the broad sweep of the negligence *per se* standard applied under the civil cause of action implied from" the statute. This Court expressly held that the common law approach was preferable, because it evaluated each case on its individual merits. "Unlike claims based on the common law tort of invasion of privacy, see Restatement (Second) of Torts § 652D (1977), civil actions based on [the Florida law] require no case-by-case findings that the disclosure of a fact about a person's private life was one that a reasonable person would find highly

offensive." 491 U.S. at 539.

3. The tort does not suffer from the "facial underinclusiveness" of the Florida statute.

The final objection to the way in which Florida was protecting its state interests was the "facial underinclusiveness" of the statute. It punished the disclosure of identity of an "instrument of mass communication" but did not punish disclosures by other means. "An individual who maliciously spreads word of the identity of a rape victim is thus not covered" although the consequences could be "equally devastating." 491 U.S. at 540.

This "underinclusiveness" was the sole ground for Justice Scalia's concurrence in the decision of the Court in *Florida Star*. He concluded that "the law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself." 491 U.S. at 541-42 (Scalia, J., concurring).

This case obviously avoids the "underinclusiveness" problem by relying on the common law cause of action. The tort applies to individual disclosures as well as mass media outlets. Suit in this case was brought against both the private discloser, Booher, and those who broadcasted her disclosure. See also *Capital Cities/ABC, Inc. v. Brady*, 740 F.Supp. 1007, 1013 (S.D.N.Y. 1990).

III. COUNTERVAILING CONSTITUTIONAL AND PUBLIC INTERESTS WERE OVERLOOKED, NOT BALANCED.

In fashioning a First Amendment privilege in this area, as the Texas court has done, the interests on each side need to be carefully balanced. "We have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater

protection under the particular circumstances presented." *Daily Mail*, 443 U.S. at 106 (Rehnquist, C.J., concurring); see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974). But, as argued above, the Texas court's holding is categorical and unqualified.

A. The Texas Court's Absolute Privilege Abridges the Constitutional Right to Privacy.

This Court has recognized a constitutional interest as well as a public policy interest in protecting the right to privacy. See *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 766-67 (1986); *Whalen v. Roe*, 429 U.S. 589, 599-600, 605-06 (1977). The privacy right probably flows from the protection of liberty in the Due Process Clause, reinforced by the common law tradition recognizing such a right as a dimension of substantive due process. *Burnham v. Superior Court*, 110 S.Ct. 2105, 2115 (1990)(plurality); *Cruzan v. Dir., Missouri Dept. of Health*, 110 S.Ct. 2841, 2852-53 (1990); *Michael H. v. Gerald D.*, 491 U.S. 110, 118-30 (1989). The First Amendment's right of association also protects "intimate human relations" from public inquiry. *City of Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989); *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987).

The Texas court's privilege would grant constitutional immunity for publicizing any disclosure of private facts by a person who can claim to be describing their own experiences or personal knowledge. As mentioned earlier, the Texas court's definition of "public concern" makes it practically unlimited. There is no requirement that constitutionally protected privacy interests be weighed in the balance. Therefore the Texas court uses state authority to shield the abridgment of other constitutional rights. It would be curious if the Constitution could be stretched to hold, on the one hand, that it is unconstitutional to publicize a

person's private, traumatic, reproductive choice, *Thornburgh v. Am. Coll.*, while holding, on the other hand, that it is unconstitutional to punish those who publicize a person's private, traumatic, reproductive experience.

B. This Absolute Privilege Also Harms Other Important Public Interests.

In addition to the constitutional interests at stake, conferring such unlimited immunity to disclosers and publishers would injure important public interests. There are, of course, the interests every individual has in privacy. The protection of some private space in the life of each citizen, especially those who have never sought the limelight of public life, is both valuable to all and a constant point of distinction between democracies and tyrannies. "Social tyranny" can indeed be "more formidable than many kinds of political oppression, since ... it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself." John Stuart Mill, *On Liberty* (1849), reprinted in *The Utilitarians* 478-79 (1961).

With the disclosure and publication of private facts, "the wrong is found in the fact that 'a private life has been transformed into a public spectacle.' ... invoking "the essential core of the right to privacy." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 *Calif.L.Rev.* 772, 839 (1985). The usual compensatory remedies are inadequate and "unlike virtually all other areas of communication, more speech or information can never rectify the wrong." *Id.*, 840. Privacy actions must therefore deter disclosers and the media to have their effect, and the courts must then balance the individual and collective interests at stake. "The danger of *chilling* the media may be no greater when privacy rather than reputation is at stake, but the societal price of insufficient *deterrence* may weigh more heavily in the privacy case." *Id.*, 843 (emphasis in original).

Other public interests are also at stake. Under the Texas court's holding, a lab technician might publicize his encounter with an AIDS case even if he knew that revealing his own identity would necessarily identify the victim of the disease. Compare, e.g., *Doe v. Borough of Barrington*, 729 F.Supp. 376, 382-85 (D.N.J. 1990)(disclosure of HIV status to neighbors justifies invasion of privacy action). Or, for another example: a professor appears on television to brag about the details of how he humiliated and sexually harassed his female student and, by revealing his identity, necessarily and foreseeably reveals hers. He and the broadcaster would be immune from suit.

Or the defendant in an ongoing legal action could appear on television and tell his story, even if the trial judge had imposed a gag rule on the parties. The legal duty embodied in the trial judge's order would have to yield to the constitutional right of disclosure established by the Texas court. Or, for another example, a plaintiff whose lawsuit was settled could go on Donahue and reveal just what he was paid. The general topic might be interesting; the plaintiff would only identify himself; and the plaintiff would be constitutionally protected from suit for violation of the nondisclosure agreement.

Many more illustrations can be offered for the broad reach of the Texas court's constitutional privilege, from trade secrets to family planning and abortion. In each case the discloser would ordinarily be bound by some legal duty not to reveal the truthful but private information. In each case the legal duty would give way before the constitutionally privileged disclosure. Beyond protection of the victims of sexual and parental abuse, there are many compelling public interests protected by the law's numerous restraints on the public disclosure of private facts. The decision of the Texas court did not balance any of these interests against those it sought to protect. This Court should.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID H. BERG
Counsel of Record
BERG & ANDROPHY
3704 Travis
Houston, TX 77002
713-524-5622

PHILIP D. ZELIKOW
79 J.F.K. Street
Cambridge, MA 02138

Counsel for Petitioners

APPENDIX A

C.J. BENINATI
CLERK DISTRICT COURT
FILED
MAR 4 1991
GALVESTON COUNTY TEXAS
BY /s/ illegible
Deputy

NO. 89-CV-0297

NANCY ANONSEN and	§	
MICHAEL ANONSEN,	§	
Individually and	§	IN THE DISTRICT
as Next Friend of	§	COURT OF
WILLIAM BOOHER, JR.	§	
Plaintiffs,	§	
v.	§	
	§	GALVESTON COUNTY,
PHIL DONAHUE, MULT-	§	TEXAS
IMEDIA ENTERTAIN-	§	
MENT, INC., JOSE	§	
PRETLOW, KTRK-TV,	§	
INC. d/b/a KTRK TV,	§	56th JUDICIAL
and MIRIAM BOOHER,	§	DISTRICT
Defendants.	§	

JUDGMENT

BE IT REMEMBERED that on the 7th day of January, 1991 came on to be heard DEFENDANTS PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., JOSE PRETLOW, KTRK-TV, INC. D/B/A/ KTRK TV, AND MIRIAM BOOHER'S Motion for Summary Judgment and that after considering the Motion for Summary Judgment

and the attachments thereto, the briefs filed in support of the motion for summary judgment, the response filed to the motion for summary judgment and attachments thereto, the briefs filed by the Plaintiffs and arguments of counsel, the Court is of the opinion that Defendants' Motion for Summary Judgment should be granted.

It is therefore ORDERED, ADJUDGED and DECREED that summary judgment be entered for and on behalf of Defendants and that Plaintiffs Nancy Anonsen, Michael Anonsen and William Booher, Jr. recover nothing by this action and that each party shall pay for costs incurred by each such party. All relief not specifically granted herein is denied.

ENTERED this 4th day of March , 1991.

/s/ illegible
JUDGE PRESIDING

APPENDIX B

COURT OF APPEALS
FIRST DISTRICT OF TEXAS

COPY OF JUDGMENT

NANCY ANONSEN AND MICHAEL ANONSEN, INDIVIDUALLY AND AS NEXT FRIENDS OF WILLIAM BOOHER, JR., APPELLANTS	Appeal from the 56th District Court, Galveston County, Texas. (Tr.Ct.No. 89CV0297). Opinion delivered by Chief Justice Oliver-Parrott, Justices Cohen and O'Connor also sitting.

NO. 01-91-00377-CV V.

PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLO, KTRK, INC.,d/b/a/ KTRK-TV, AND MIRIAM BOOHER, APPELLEES

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on January 7, 1991. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore **CONSIDERED, ADJUDGED, AND ORDERED** that the judgment of the court below be in all things **affirmed**.

It is further **ORDERED** that the appellants, **NANCY ANONSEN AND MICHAEL ANONSEN,**

INDIVIDUALLY AND AS NEXT FRIENDS OF WILLIAM BOOHER, JR., jointly and severally, pay the costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Chief Justice Oliver-Parrott, Justices Cohen and O'Connor.

Judgment entered JUN 03 1993 , 1993.

In The
Court of Appeals
For The
First District of Texas

No. 01-91-00377-CV

NANCY ANONSEN AND MICHAEL ANONSEN, INDIVIDUALLY AND AS NEXT FRIENDS OF WILLIAM BOOHER, JR., Appellants

V.

PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLO, KTRK, INC. d/b/a KTRK-TV, AND MIRIAM BOOHER, Appellees

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On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 89CV0297

O P I N I O N

The question before the Court is whether a person's right to make public the most private details of their own life is limited when the information also reveals painful intimacies of other persons. We find that it is not.

On January 5, 1989, appellee, Miriam (Mickey) Booher appeared as a guest on the Phil Donahue Show, the subject matter of which was pregnancies resulting from incest

or rape. Booher told a nationwide audience the story of her husband's rape of her daughter from a previous marriage when the child was 11 years old. Booher also revealed that she had never reported the rape to authorities; that she had remained married to her husband for some 16 to 17 years after the incident; and that her 16-year old adopted son, who had been raised as her daughter's adopted half-brother, was actually her daughter's biological child. Although the names of Booher's husband, daughter, and grandson were not disclosed on the air, Booher used her own full name. From time to time the caption "Daughter Had Husband's Baby" appeared on the screen as Booher spoke.

As a result of the broadcast, appellants brought this suit against Booher and the other appellees, alleging invasion of privacy through the public disclosure of private facts and intentional and negligent infliction of emotional distress. Their complaint is that by disclosing her own identity, Booher effectively disclosed their identities as well, thus exposing the incestuous rape of Anonsen and the circumstances of her child's birth to a nationwide audience. The trial court granted summary judgment in favor of all defendants. Finding that Booher's right to publish her personal account of her family's tragedy is protected speech under the first amendment of the United States Constitution, we affirm.

Booher told the Donahue show audience that she had met her husband in Germany and moved to Arkansas with him and her six-year-old daughter, Nancy, whom he adopted. Sometime in 1972, Booher's husband raped Nancy, who was then 11 years old. Nancy became pregnant as a result and gave birth to a boy. Booher claimed that she did not know at the time that her husband was the child's father. Her husband insisted that they should give their daughter love and understanding and that they should adopt the child and raise

it as their own. Booher assented. It was not until five years later that Booher learned the real story of her daughter's pregnancy when, in anger, her husband revealed the truth.

Booher claimed that upon learning the truth, she ordered her husband to leave but reconciled with him shortly thereafter because of economic hardship. Booher told the viewers that she could neither read or write English, could obtain only menial jobs, and she feared for her welfare and the welfare of her children. In addition, at that time, Booher's daughter did not know that Booher had learned the truth about the rape, and her grandson/adopted son "loved his daddy." Maintaining physical separation in the same house, Booher and her husband continued to live together until her adopted son was 15 years old. At that time, the boy learned the truth about his parents, and, according to Booher, there was no longer a need for pretense. She and her husband, who was at all relevant times a police officer, separated formally and were divorced sometime thereafter.

Appellants acknowledge that the story told by Booher is true. In addition, they assert the following facts that led up to Booher's appearance on the Donahue show. After Booher's husband left her and filed for divorce in 1988, she wrote a letter about the rape and sent it to four nationally broadcast talk shows. Booher was motivated by revenge and the desire to sell a book about her life. Only Donahue's producer responded to the letter. No member of Donahue's staff ever contacted Anonsen or her son to verify Booher's story or to determine whether they consented to the broadcast.

In fact, Anonsen testified that she told her mother not to go on the Donahue show because "too many people will get hurt." Booher told Anonsen that she had canceled her plans to appear. Anonsen learned of her mother's

appearance from her husband. Plaintiff, Michael Anonsen saw the show when it was broadcast on **KTRK-TV**. William, Jr., who was 16 years old at the time, testified that he watched the show with his father. After the show, his high school classmates harassed him, calling him a "bastard." He had to transfer to another school to escape the harassment.

Until the Donahue broadcast, the story of Anonsen's rape and the truth about William, Jr.'s real parents had never been reported to the authorities, or made a part of any public record. Appellants maintain that the story had been revealed only to a few close friends and relatives.

For purposes of this opinion we will accept all appellant's factual assertions as true and look at the summary judgment proof in a light most favorable to them. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

Without specifically so holding, the United States Supreme Court has indicated that the tort of invasion of privacy may encompass a cause of action for public disclosure of private facts, even if the facts are true. *See Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 487-91 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7(1967); *see also, Virgil v. Time, Inc.*, 527 F.2d 1122, 1127 (9th Cir. 1975). The purpose of the tort is to protect the individual against unwarranted publication of private facts. However, the protection of the individual must be balanced with the privilege of the press to give publicity to matters of public interest that arise out of the desire and the right of the public to know what is going on in the world and the freedom of the press and other information agencies to report it. *See Times, Inc.*, 385 U.S. at 388; *see also generally*, Prosser and Keaton on Torts, (5th ed. 1984); RESTATEMENT (Second)

of Torts § 652 D & cmt. § 652 D (1989). While there generally can be no liability for publication of truthful information contained in official records open to public inspection, *Floyd v. Park Cities People, Inc.*, 685 S.W.2d 96, 97-98 (Tex. App.--Dallas 1985, no writ), a different standard may apply in cases where the facts revealed are not a matter of any public record. *See Cox Broadcasting Corp.*, 420 U.S. at 491.

To prevail in a common-law tort cause of action for invasion of privacy, a plaintiff must establish the following elements:

> (1) publicity was given to matters concerning the plaintiff's private life;
>
> (2) the matters made public would be highly offensive to a reasonable person of ordinary sensibilities;
>
> (3) the matters publicized were not of legitimate public concern.

Indus.Found. v. Texas Indus. Acc. Bd., 540 S.W.2d 668, 682 (Tex. 1976); *see also Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973).

The defendants, Booher, along with Multimedia Entertainment, Inc. and Multimedia, Inc., who produce the Donahue show; the show's host, Phil Donahue; Jose Pretlo, the producer of the show involving Booher; and KTRK, INC. d/b/a KTRK TV, the television channel that broadcast the show in the Houston-Galveston area (collectively, the "media defendants"), moved for summary judgment of the following grounds:

(1) The published facts concerning incest, sexual abuse, and acceptance and understanding of the victims of these crimes, were of legitimate concern to the public.

(2) No private facts were published to the public at large.

(3) Booher's personal revelations were protected under the first and fourteenth Amendments of the United States Constitution.

In addition to the grounds asserted by the other defendants, KTRK moved for summary judgment on the grounds that (1) it had no duty to prescreen the show because it was justified in relying on Metromedia's warranty that the show did not violate such rights, and (2) the nationwide broadcast of the show, three days before it was aired in the Houston-Galveston area, precluded an action against KTRK for public disclosure of private facts.

To obtain summary judgment, a defendant has the burden of establishing by competent summary judgment proof that, as a matter of law, there is no genuine issue of material fact as to one or more essential elements of the plaintiff's cause of action. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827 (828 (Tex. 1970). While the defendants' motion for summary judgment and the plaintiffs' response addressed all three elements of the privacy tort, as well as the plaintiffs' other causes of action, we find the analysis of the third element to be dispositive of the appeal.

It is the third element of the tort, i.e., the publicizing of matters not of legitimate public concern, that gives rise to a first amendment privilege, sometimes referred to as the

"newsworthiness defense," to publish or broadcast news or other matters of public interest. *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 272 (5th Cir. 1989); *Dresbach v. Doubleday & Co., Inc.*, 518 F.Supp. 1285, 1287 (D.D.C. 1981). The privilege to discuss matters of public interest extends to information concerning interesting phases of human activity and must embrace all issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period. *Times, Inc.*, 385 U.S. at 388; *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980). The privilege is broad and extends beyond subjects of political or public affairs to all matters of the kind customarily regarded as "news" and all matters giving information to the public for purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published. *Virgil*, 527 F.2d at 1129.

> The risk of . . . exposure [of the individual to others] is an essential incident of life in a society which places a primary value on freedom of speech and of press. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Time, Inc., 385 U.S. at 388.

Appellants assert that whether a subject is of legitimate public concern is a question of fact for a jury. Specifically, they contend that a jury should decide whether their identities were newsworthy so as to warrant revelation. We cannot agree, however, under the particular facts and circumstances of this case.

Whether the issue is a question of law or fact, there are two inquiries involved in a determination of whether Booher's revelations during her appearance on the Donahue show broadcast were protected by the first amendment; (1) whether the show's general subjects, incest, rape, and the children born of those crimes, were within the scope of the first amendment privilege; and if they were, (2) whether Mickey Booher's revelation of her own identity was also protected by the first amendment. *See Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 274 (5th Cir. 1989); *Times Mirror Co. v. Superior Court*, 244 Ca. Rptr. 556, 561-62 (Cal.Ct.App. 1988), *cert. denied*, 109 S.Ct. 862 (1989) (while the general subject matter of a publication may be newsworthy, it does not necessarily follow that all information given in the account is newsworthy.

In each case relied on by appellants, the court has no problem determining, as a matter of law, whether the general subject matter context of the published facts is newsworthy. In *Time, Inc.*, the Supreme Court had "no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest" within the scope of protection afforded by constitutional guarantees of speech and press. *Time, Inc.*,385 U.S. at 388. The court in *Hall v. Post*, 355 S.E.2d 819, 826 (N.C. Ct. App. 1987), held that the topic of adoption and its related issues are of "legitimate interest, in a general way, to the public." Likewise, in *Virgil*, the court conceded that "the privilege to publicize newsworthy matters would, as a matter of law, extend to the general subject of surfing." *Virgil*, 527 F.2d at 1131.

Like those courts before us, we have no doubt that, as a matter of law, the crimes of incest and rape, the victimization of innocent people whose lives are touched by those crimes, and the importance of fostering understanding

and healing of those victims, are matters of legitimate public concern. It is the second part of the inquiry that sets the instant case apart from most of the cases relied on by the parties, both in the trial court below and in their exhaustive briefs on appeal.

While frequently deciding the newsworthiness of *general topics* as a matter of law, courts have acknowledged the possible existence of fact questions about the newsworthiness of the plaintiff's identity, or of private facts about the plaintiff, allegedly unrelated to those general topics. [1] It is those highly fact-specific issues that some courts have found might raise an issue for determination by a jury. *See Times Mirror Co.*, 244 Cal. Rptr. at 564 (whether the publication of a murder witness' name was newsworthy was a question of fact); *see also Virgil*, 527 F.2d at 1131 (whether private facts unrelated to the sport were of legitimate public interest in relation to an article on surfing was a question of fact). As the *Virgil* court succinctly put it, "the fact that [individuals] engage in an activity in which the public can be said to have a general interest does not render every aspect of their lives subject to public disclosure." *Virgil*, 527 F.2d at 1131.

In those cases that address the newsworthiness of the plaintiff's identity, the identity of the plaintiff had been revealed by a third party who had no connection with the events other than to report them. *See, e.g., Cox*

---

1. In *Hall*, the court found that the newsworthiness of the private facts published about the plaintiff's adoption, including the identities of the parties, was an issue on which reasonable minds could differ and should be decided by a jury. In addition, the court found a fact issue existed about whether some or all of the facts of the adoption were publicly known or were, in fact, private. *Hall*, 355 S.E.2d at 828.

Broadcasting Co., 420 U.S. at 473-74 (broadcasting company identified deceased rape victim during coverage of trial of alleged rapist. *Time, Inc.*, 385 U.S. at 374 (magazine reported that new play portrayed experience of plaintiff and his family who had been held hostage in their home by escaped convicts); *Hall*, 355 S.E.2d at 820 (newspaper revealed identity of adopted child and her adoptive and birth mothers in a story about the details of that particular adoption); *Ross*, 870 F.2d at 271 (TV documentary revealed rape victim's first name and showed photo of her residence in a program supporting the pardon of an allegedly wrongly convicted rapist); *Harris by Harris v. Easton Pub. Co.*, 483 A.2d 1377 (Pa. Super. Ct. 1984) (newspaper published unrelated private facts about the family of a welfare applicant); *DeGregorio v. CBS, Inc.*, 473 N.Y.S.2d 922 (N.Y. 1984) (in a feature story about romance, broadcaster showed film of two hard hat workers holding hands on public street); *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665 (Cal. Ct. App. 1984) (newspaper revealed that who saved President Ford from assassination was gay); *Hebert v. Roshto*, 439 So.2d 428 (La. 1983) (newspaper published a 25-year-old article containing details of criminal convictions for which plaintiffs had been pardoned); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr., 762 (Cal. Ct. App. 1983) (newspaper revealed that class president was a transsexual in a follow-up article to an unrelated story about class finances); *Gilbert v. Medical Economics Co.*, 665 F.2d 305 (10th Cir. 1981) (publisher revealed physician's name, photo, and psychiatric history in article about failure of medical profession to police its members).

We do not believe that the issue of newsworthiness of the parties' identities, whether a question of law or a question of fact, is relevant to the ultimate inquiry before us: whether Booher had the right to reveal *her own identity*.

In the present case, Booher, like her daughter and grandson, is herself one of the victims of the family tragedy of incest. Her reactions to that tragedy, the impact on her life of her daughter's rape, the birth of the child of that rape, whom she adopted and raised as her own, and her eventual discovery of the truth about her husband -- all comprise her story as well as that of the other family members. Therefore, we are unable to agree with appellants' contention that a jury should be allowed to determine whether Booher's voluntary, undisguised appearance on the Donahue show was no more than "morbid and sensational prying."

We find two cases especially persuasive in our analysis of Booher's right to reveal her identity in telling the story of her experience, thus making the identities of appellants ascertainable. In *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980), the plaintiff sued for invasion of privacy, complaining that private facts about her marriage were disclosed in an autobiography written by her husband's brother. As in the situation before us, the matters were not a part of any public record, nor, apparently, had they been widely publicized and thus rendered not private. The author revealed the facts in discussing the effect on his life of the marriage of his older brother, with whom he shared a very close relationship.

In *Campbell*, the trial court granted summary judgment for the author. The appellate court affirmed, holding that there is a first amendment privilege to publish truthful information of legitimate public concern, and the privilege encompasses dissemination of information relating to even individuals who have not sought or who have attempted to avoid publicity. *Campbell*, 614 F.2d at 397. The court observed that the privacy of such individuals is protected, however, by requiring that logical nexus exist between the identity of the individual and the matter of

legitimate public interest.[2] *Id.* The court then determined that the private facts of his brother's marriage, as they affected the author, had the requisite logical nexus to fall within the ambit of the constitutional protection. *Id.*

Likewise, in *Dresbach*, the plaintiff sued a book publisher and others for invasion of his privacy through their publication of a book about his brother's murder of their parents some 19 years earlier. Although the court acknowledged the absolute privilege accorded matters in the public record, it went on to decide the case on the grounds, specifically stating, "we must decide whether true matters in the book were matters of public interest at the time they were published and whether the inclusion of plaintiff in connection with those matters was legitimate, or whether the countervailing interest in plaintiff's privacy concerning those matters many years after the events renders the publication actionable." *Dresbach*, 518 F.Supp. at 1289-1290.

The court first determined that the subject matter of the book, the brother's past crime, his motivation, his prison experiences, his rehabilitation, and the support and lack of support extended by his friends and family, was a matter of legitimate public concern as a matter of law. *Dresbach*, 518 F.Supp. at 1290. Next, the court closely analyzed the disclosure of the plaintiff's identity under the logical nexus requirement articulated in *Campbell*. Based upon its analysis, the court concluded that the book could not have been written "without including private facts about the plaintiff's homelife which obviously was intimately bound up with his brother's homelife." *Id.* Unfortunately, appellants are in the same unenviable position in relation to Booher's life.

---

2. It should be noted that the plaintiff in *Campbell* did not contend that the autobiography was without legitimate public interest.

Acknowledging the dangers of creating restrictions on the individual's right to self-expression, the court stated:

> [W]e tread on dangerous ground deciding exactly what matters are sufficiently relevant to a subject of legitimate public interest to be privileged. First Amendment values could obviously be threatened by the uncertainty such decisions could create for writers and publishers. Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substitute its judgment for that of the publisher . . . . Clearly here, where the important public issues of crime, the criminal justice system, and rehabilitation are concerned, the defendants have shown an adequate nexus between matters of legitimate public interest and the disclosures about the plaintiff to merit constitutional protection.

Dresbach, 518 F.Supp. at 1290-1291 (citations omitted).

In the context of their personal stories, which were undoubtedly theirs to tell, both Campbell's and Dresbach's revelations of private facts about others involved in their lives were protected by the first amendment. We find that Booher's rights are similarly protected. As appellees suggest, to hold otherwise would be to imply that one's autobiography must be written anonymously.

Like the court in *Dresbach*, we are not without compassion for appellants, who certainly have been victimized by the tragic events revealed on the Donahue program. We are further mindful that the protection of Booher's right to reveal her story and her identity imposes additional emotional suffering upon appellants. Sensitive

information which appellants have to some extent attempted to keep secret, has been given unwelcome publicity, causing them pain. Yet, we conclude that to allow a cause of action based upon Booher's truthful and undisguised account of her own and her family's experience is inconsistent with the first amendment. Freedom of speech would be severely compromised if discussions of matters of public interest were circumscribed in the manner advocated by appellants.

The summary judgment must, therefore, be affirmed.

/s/ Alice Oliver-Parrott
Alice Oliver-Parrott
Chief Justice

Justices Cohen and O'Connor also sitting.

Publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered JUN 03 1993
True Copy Attest:

/s/ Kathryn Cox
Kathryn Cox
Clerk of Court

APPENDIX C

(stamp illegible)

No. 01-91-0377-CV

APPLICATION OF WRIT OF ERROR TO
THE SUPREME COURT OF TEXAS

NANCY ANONSEN and MICHAEL ANONSEN
Individually and as Next Friends of WILLIAM
BOOHER, JR., a Minor

Petitioners

WRIT DENIED

V.

PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT,
INC., MULTIMEDIA, INC., JOSE PRETLO, KTRK, INC.
d/b/a KTRK TV, and MIRIAM BOOHER

Respondents

LIST OF NAMES OF PARTIES

The following individuals and entities have an interest in the subject matter of this case:

Ms. Nancy Anonsen
1003 19th Street
Galveston , Texas

Mr. Michael Anonsen
1003 19th Street
Galveston, Texas

Mr. William Booher, Jr.
1003 19th Street
Galveston, Texas
10017

Mr. Phil Donahue
30 Rockefeller Plaza
New York, New York

Multimedia,
Entertainment, Inc.
75 Rockefeller Plaza
Suite 827
New York, New York 10019

Multimedia, Inc.
75 Rockefeller Plaza
Suite 827
New York, New York
10019

Mr. Jose Pretlo
Multimedia Entertainment
30 Rockefeller Plaza
Suite 827
New York, New York 10017

KTRK, Inc. d/b/a
KTRK TV
3310 Bissonnet
Houston, Texas 77005

Ms. Miriam Booher
410 Prickett Road
Bryant, Arkansas 72022

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk
January 5, 1994

Mr. David Berg
Berg & Androphy
3704 Travis Street
Houston, TX 77002

Mr. James B. Galbraith
McLeod, Alexander,
Powel & Apffel, P.C.
P. O. Box 629
Galveston, TX
77553-0629

Mr. Kenneth J. Bower
McLeod Alexander
Powel & Apffel
802 Rosenberg
P. O. Box 629
Galveston, TX 77553-0629

Mr. Otto D. Hewitt,III
The Davenport Law Firm
1480 East Highway 6
Alvin, TX 77511

Mr. R. James George, Jr.
George, Donaldson & Ford
1000 Norwood Tower
114 W. 7th Street
Austin, TX 78701

Ms. Amy C. Wright
George, Donaldson &
Ford, L.L.P.
1000 Norwood Tower
114 W. 7th Street
Austin, TX 78701

Ms. Julie A. Ford
George, Donaldson
& Ford, L.L.P.
114 W. 7th St.
1000 Norwood Tower
Austin, TX 78701

RE: Case No. D-4138

Style: NANCY ANONSEN and MICHAEL ANONSEN, INDIVIDUALLY AND AS NEXT FRIENDS OF WILLIAM BOOHER, JR., A MINOR v. PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLO, KTRK, INC. D/B/A KTRK

Dear Counsel:

Motion for rehearing of application for writ of error in the above referenced case was this day overruled.

Sincerely,

John T. Adams, Clerk

by /s/ illegible
Courtland Crocker
Deputy

41-120. Accessory after the fact.—An accessory after the fact is a person who, after a full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime. [Rev. Stat., ch. 44, div. 3, art 8, § 3; C. & M. Dig., § 2310; Pope's Dig., § 2936.]

41-811. Incest defined.—Persons marrying, who are within the degrees of consanguinity within which marriages are declared by law to be incestuous, or void absolutely, or who shall commit adultery or fornication with each other, shall be deemed guilty of incest. [Rev. Stat., ch. 44, div. 4, art 7, § 5; C. & M. Dig., § 2628; Pope's Dig., § 3318.]

41-812 Penalty for incest.— Whoever shall be convicted of incest shall be imprisoned in the penitentiary for a period not less than three [3] nor more than ten [10] years. [Act Dec. 17, 1838, § 4 (2nd sent.), p. 121; C. & M. Dig., § 2629; Pope's Dig., § 3319.]

41-3404. Accessory to rape. —Accessories before or after the fact to the crime of rape shall be punished by imprisonment in the penitentiary for a period of not less than five [5] years nor more than twenty-one [21] years. [Act Dec. 17, 1838, § 4 (1st sent.,clause 2), § 10 (3rd & 4th sent.), p. 121; C & M Dig., § 2312; Pope's Dig., § 2938.]

41-3406. Carnal abuse—Penalty.—Every person convicted of carnally knowing, or abusing unlawfully, any female person under the age of sixteen [16] years, shall be imprisoned in the penitentiary for a period of not less than one [1] year nor more than twenty-one [21] years. [Act Feb. 13, 1899, No. 12, § 1, p. 10; C & M Dig., § 2720; Pope's Dig., § 3406.]

43-1602. Felonies other than capital.—No person shall be prosecuted, tried, and punished for any other felony unless an indictment be found within three [3] years after the commission of the offense; Provided, that in cases of embezzlement of funds by an administrator, guardian, or curator the limitation shall not begin to run until an accounting has been had and such administrator, guardian, or curator has been ordered by a court of competent jurisdiction to pay over the funds and in other cases of embezzlement of trust funds the limitation shall not begin to run until the defalcation is discovered. [Rev. Stat., ch. 45, § 251; Acts 1923, No. 202, § 1, p. 176; C. & M. Dig., § 2886; Pope's Dig., § 3702.]

Supreme Court, U.S.
FILED
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No. 93-1585

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NANCY ANONSEN and MICHAEL ANONSEN, individually and as next friends of WILLIAM BOOHER, Jr.,
Petitioners,
v.
PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLOW, KTRK, INC. D/B/A KTRK-TV, and MIRIAM BOOHER,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

BRIEF IN OPPOSITION

KENNETH J. BOWER
(Counsel of Record)
JAMES B. GALBRAITH
McLeod, Alexander, Powel & Apffel, P.C.
802 Rosenberg; P.O. Box 629
Galveston, Texas 77553
409-763-2481

Attorneys for Respondent
Miriam Booher

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

QUESTION PRESENTED

Does the first amendment entitle a mother to speak of difficulties she faced after her husband (a police officer) raped and impregnated her then 11-year old child, given 1) she spoke the truth and revealed no name but her own, 2) the rapist was never punished and remained a police officer, 3) the facts disclosed were no longer private, and 4) she never pledged confidentiality?

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No. 93-1585

IN THE
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OCTOBER TERM, 1993

NANCY ANONSEN and MICHAEL ANONSEN,
individually and as next friends of WILLIAM BOOHER, Jr.,
Petitioners,

v.

PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLOW, KTRK, INC. D/B/A KTRK-TV, and MIRIAM BOOHER,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

BRIEF IN OPPOSITION

Respondent Miriam Booher respectfully submits this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

A. Disposition Below

Miriam Booher appeared as a guest on the "Donahue" television show and spoke of difficulties she faced after her husband (a police officer) raped and impregnated her then 11-year old daughter (Nancy Anonsen). She said she adopted her daughter's baby (William Booher, Jr.) and divorced her husband, who was never punished and remained a police officer. She disclosed no name but her own and spoke only the truth.

Miriam's children (Nancy and William) and former son-in-law (Michael Anonsen) sued her and the other respondents for publicizing private facts and inflicting emotional distress. All respondents moved for summary judgment on grounds that Miriam's statements were protected by the Texas and United States Constitutions; alternatively, that uncontroverted evidence negated essential elements of the alleged torts. (Tr. 78-105, 940-948).

The trial court granted summary judgment without specifying the grounds; hence, the judgment could be affirmed on any grounds raised at trial. **Carr v. Brasher**, 776 S.W.2d 567, 569 (Tex. 1989). The court of appeals affirmed on first amendment grounds. The Texas Supreme Court denied petitioners' application for writ because it presented "no error which requires reversal, or which is of such importance to the jurisprudence of the State as to require correction." Tex. R. App. P. 133(a).

B. Statement Of Facts

A counterstatement of the evidence is required to correct errors in petitioners' version.

1. The Rape And Resulting Publicity

In 1972, Miriam Booher learned that her 12-year old daughter (Nancy Anonsen) was pregnant. (Tr. 382-383). Miriam did not know the rapist's identity at the time. (Tr. 384). After Nancy gave birth to William Booher, Jr. ("Little Bill"), Miriam and her husband adopted Little Bill. (Tr. 387-390). In 1977, Miriam discovered that the rapist was her husband (William Booher, Sr.), an Arkansas state trooper. (Tr. 390-392).

Petitioners now claim that Miriam was a "criminal accessory" to her child's rape. No such claim was asserted in the Texas courts. It is groundless and desperate.

Likewise, petitioners falsely claim that Miriam disclosed a "closely held family secret". It was no secret that Nancy (a pregnant child) had been raped. And it was widely known before the Donahue program that the rapist was her father; and Little Bill, her biological son. Nancy admitted telling co-workers, employers, the Arkansas police and Judge Norman Lee (Harris County district judge). (Tr. 101-102, 181, 308, 543, 599-629, 676-677, 688, 736-742, 1320-1321). Miriam told friends (Tr. 89-104, 370-528), and Little Bill told classmates. (Tr. 336, 754, 777-778, 1324). In Miriam's words, it was "the talk of the city". (Tr. 407). Little Bill said "everybody knows". (Tr. 427). Nancy's friend, Tamara Hill, estimated that at least 25,000 people in Bryant, Arkansas knew. (Tr. 574). The director of the Arkansas state police said he knew. (Tr. 133, 498).[1]

Petitioners falsely state that Miriam never reported the rape to the police before the Donahue program. In truth, she had told the director of the Arkansas state police (Tr. 133, 498), as well as Officer Gary Robinson. (Tr. 1046-1047). Before the Donahue program, Officer Booher's incest was common knowledge at the Lafayette County police department and the criminal investigation division of the Arkansas state police. (Tr. 104, 498).

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[1]An addendum to the co-defendants' motion for summary judgment summarizes the evidence. Part 1 of the addendum identifies individuals who knew. (Tr. 89-101). Part 2 identifies those who were told by petitioners. (Tr. 101-103). Part 3 identifies the extent to which it was common knowledge. (Tr. 103-104). Part 4 indicates the extent to which the Arkansas police knew. (Tr. 104).

2. Events Leading To The Donahue Program

In 1988, Miriam Booher wrote to Donahue about the rape, stating that the rapist was her ex-husband and a state trooper. (Tr. 471, 515). Little Bill helped write the letter, and an employee at the district attorney's office typed it. (Tr. 473). Miriam said she told her story because victims of sexual abuse need to know they are not alone and the social problem requires public discussion. (Tr. 476-477).

Originally, Little Bill wanted to appear with his mother on the Donahue program. (Tr. 480). He changed his mind after he moved to live with his father, telling his mother:

> I don't want to hurt daddy. He might lose his job. But if you want to go, it's fine with me.

(Tr. 479-481).

Nancy Anonsen also wanted to appear on the program. She said: "Oh, Mama... I just love Donahue, and they stay in such fancy motels." (Tr. 485). Later, she changed her mind, but told her mother to go and "tell them that it's not my fault; I didn't do anything wrong." (Tr. 486-488).

Whether or not Nancy or Little Bill wanted their mother to appear on the program, there is uncontroverted evidence that they never told her not to do so. (Tr. 481-488). Moreover, the record is devoid of any evidence or allegation that Miriam "pledged" not to do so.

3. The Donahue Program

Miriam Booher appeared on the program with other victims of sexual abuse, a counselor and a psychologist. (Tr. 113).[2] Phil Donahue introduced the program's topic:

> More and more victims of incest and rape are keeping their babies. Do you understand that? Do you think it's a good idea? Would you keep your baby if your pregnancy were the result of a violent assault? Would you keep your baby in the case of incest? And will this be a reminder of a painful moment for the rest of your life? How do you emotionally relate to a child who is born out of this kind of painful experience? Meet (Miriam) Booher. Your daughter gave birth to a baby that was actually fathered by your husband.

(Tr. 213).

Miriam discussed how she met her husband, her decision to adopt her daughter's baby, her discovery that her husband was the father, and their divorce after Little Bill turned 16. She revealed no names and never said where Nancy, Little Bill or her ex-husband lived. (Tr. 113-121).

A clinical psychologist, Dr. John Briere, appeared on the program to explain causes of sexual abuse and how to cope with it. Shirley Turcotte, a counselor, addressed problems that victims must overcome. Other victims of sexual abuse related their own stories of survival. Organizations that assist incest victims were identified. Regarding Miriam Booher's appearance, Dr. Briere stated:

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[2]The record includes a videotape of the program.

"I'm quite impressed with her bravery." (Tr. 114). Regarding the program itself, Dr. Briere stated:

> I think... we have to face the fact that our culture is a violent culture, where people with lesser power are often dramatically exploited. This is also a culture where that *has to remain a secret* in order for the exploitation and the degradation to continue. *Breaking that secret* through talk shows, radio programs, books, whatever, *is extremely important*. (emphasis added).

(Tr. 116).

The show's producer, Jose Pretlow, said his purpose was to let incest victims know they are not alone and where they can go for help. (Tr. 933). Miriam Booher's undisguised appearance, he said, increased the program's impact and removed Officer Booher from the police force. (Tr. 938).

Contrary to petitioners' claims on appeal, Miriam did not discuss details of the rape, Donahue did not admit he sensationalized programs, and the program was not entitled "Forbidden Pregnancies".[3]

4. The Impact Of The Donahue Program

After the Donahue program, then Governor Clinton ordered an investigation and Officer Booher quickly resigned. (Tr. 144-145). However, contrary to petitioners' allegation, there is no evidence that the disclosures on the Donahue program permitted anyone not already familiar with

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[3]The program was entitled "Pregnancy from Incest". (Tr. 1238).

Miriam's story to link it to Nancy or Little Bill; nor is there evidence that Nancy and Little Bill "began receiving medical treatment for the trauma" caused by the program.

REASONS FOR DENYING WRIT

I. THE FIRST AMENDMENT ENTITLED MIRIAM BOOHER TO SUMMARY JUDGMENT

A. The Right To Speak The Truth Is Fundamental

The right of free speech is a fundamental individual liberty, "essential to the common quest for truth and the vitality of society." **Hustler Magazine v. Falwell**, 485 U.S. 46, 50-51 (1988). All citizens have this right, not just the media. **Murdock v. Pennsylvania**, 319 U.S. 105, 111 (1943).

No court has ever held a mother liable for revealing that her husband raped her child. No court has ever held that one must remain anonymous when sharing important experiences in one's life. Neither this Court nor any Texas court has ever upheld recovery for 1) publicizing private facts, 2) causing emotional distress by telling the truth, or 3) publishing a rape victim's name. To the contrary, whenever this Court or any Texas court has addressed free speech, privacy and emotional distress, the right to speak the truth has always prevailed. As stated in **Smith v. Daily Mail Publishing Co.**, 443 U.S. 97, 102 (1979), "state action to punish the publication of truthful information seldom can satisfy constitutional standards."

Generally, the first amendment precludes states from imposing liability for protected speech unless the state can prove 1) it has an interest that overrides the federal interest

in free speech, and 2) the basis for liability is narrowly tailored to serve the state interest. **The Florida Star v. B.J.F.**, 491 U.S. 524 (1989); **Cox Broadcasting Corp. v. Cohn**, 420 U.S. 469 (1975)(publication of rape victim's identity privileged); **Hustler Magazine v. Falwell**, 485 U.S. 46 (1988)(first amendment precludes liability for infliction of emotional distress absent proof of knowing falsehood). In each of these cases, this Court held that the state efforts to punish speech violated the first amendment. Likewise, the Texas court in this case vindicated free speech, concluding that federal interests outweighed any Texas interest in privacy or freedom from emotional distress.

The Texas court's refusal to elevate Texas interests over the federal interest in free speech is consistent with Texas jurisprudence. After all, the Texas Supreme Court has held that the Texas Constitution (art. I, §8) is more protective of speech than is the first amendment. **Ex parte: Tucci**, 859 S.W.2d 1 (Tex. 1993); **Davenport v. Garcia**, 834 S.W.2d 4 (Tex. 1992).[4] Moreover, it recently abolished the tort of negligent infliction of emotional distress. **Boyles v. Kerr**, 855 S.W.2d 593 (Tex. 1993). And it has never adopted the tort of publication of private facts.[5]

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[4]Art. I, §8 provides:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or the press.

[5]North Carolina abolished the tort as unnecessary and constitutionally infirm. **Hall v. Post**, 372 S.E.2d 711 (N.C. 1988). See also, **Cox Broadcasting Corp. v. Cohn**, 420 U.S. 469, 489 (1985)(tort of

B. Booher Spoke The Truth About Matters Of Public Concern

The Texas court had no difficulty concluding that Miriam Booher's story was of legitimate public concern:

> [W]e have no doubt that, as a matter of law, the crimes of incest and rape, the victimization of innocent people whose lives are touched by those crimes, and the importance of fostering understanding and healing of those victims, are matters of legitimate public concern.

857 S.W.2d at 704. The court could well have added that the story led to identification and removal of a rapist from the Arkansas police force.

The privilege to discuss matters of public interest extends to all interesting phases of human activity and embraces all issues about which information is needed or appropriate to cope with exigencies. **Time, Inc. v. Hill**, 385 U.S. 374, 383 n.7 (1967); **Campbell v. Seabury Press**, 614 F.2d 395, 397 (5th Cir. 1980). The privilege is broad and extends beyond political and public affairs to all matters customarily called "news" and all matters giving information to the public for purposes of education, amusement or enlightenment. **McNamara v. Freedom Newspapers, Inc.**, 802 S.W.2d 901, 904 (Tex.App.- Corpus Christi 1991, writ den.). Body surfing is a matter of legitimate public interest. **Virgil v. Time, Inc.**, 527 F.2d 1122, 1129 (9th Cir. 1975).

The privilege to disclose information of legitimate public concern stops only when it becomes a morbid and

---

publication of private facts is constitutionally suspect).

sensational prying into private lives for its own sake. **Sipple v. The Chronicle Publishing Co.**, 201 Cal. Rptr. 665 (Cal. App. 1984); **Hall v. Post**, 372 S.E.2d at 714; *Rest. (2d) of Torts* § *652D*. Comment f to § 652D states:

> Those who commit crime... are... persons of public interest, concerning whom the public is entitled to be informed. The same is true as to... the victims of crime... These persons are... properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them.

Illustration 15 (under comment f) identifies the birth of a child to a 12-year old as a matter of public interest. The illustration is based on **Meetze v. The Associated Press**, 95 S.E.2d 606, 610 (S.C. 1956)("there are times when one, whether willingly or not, becomes an actor in an occurrence of public or general interest.").

Miriam Booher's statements addressed a dark, national tragedy. She was not guilty of morbid and sensational prying. Indeed, there was no prying at all. She merely shared her own experience coping with rape and incest. As a matter of law, her statements were of legitimate public concern.

C. Booher Had The Right To Reveal Her Own Identity

Petitioners claim that Miriam Booher should have concealed her identity because it was not newsworthy. The Texas court properly determined that the newsworthiness of Miriam's identity was irrelevant. 857 S.W.2d at 705.

Miriam herself was a victim of the family tragedy of incest. Her story was about her own life. It was her decision to remain anonymous or not.

The first amendment is not the only constitutional basis for Miriam's right to speak of family matters openly and undisguised. This Court has recognized a constitutional zone of privacy that includes the right to freely make important personal decisions--with or without legitimate reasons. See e.g., **Roe v. Wade**, 410 U.S. 113 (1973)(right to terminate pregnancy); **Griswold v. Connecticut**, 381 U.S. 479 (1965)(right to use contraception).

Assuming Miriam needed a legitimate reason to reveal her identity, she had one. Her case history provided a personal frame of reference and sense of urgency that psychologists and counselors sitting alone could not provide. Revealing her identity lent credibility to her story. Moreover, remaining anonymous would have conflicted with the program's central theme--that silence about incest increases the chance it will recur and inhibits emotional healing. Thus, Miriam Booher was entitled to tell her story without remaining nameless or faceless.

Several cases support Miriam's right to tell her story. In **Campbell v. Seabury Press**, 614 F.2d 395 (5th Cir. 1980), the defendant wrote an autobiography that discussed his brother's marriage. The brother's wife sued, alleging publication of private facts. The 5th Circuit affirmed summary judgment for defendant on first amendment grounds.

The brother's wife argued that even if the autobiography was of public interest, there was no reason for it to discuss her marriage. The 5th Circuit disagreed, finding reason enough in the fact that the brother's wife was the brother's wife:

> A review of the record... clearly shows the requisite logical nexus. An account of the author's close association with his... brother certainly is appropriate... Likewise, accounts of his brother's marriage as they impacted on the author have the requisite logical nexus to fall within the ambit of constitutional protection.

Id. There was a logical nexus between Miriam's life and her name; hence, her autobiography would not have to be anonymous. There was also a logical nexus between her life and every event that impacted on it, including the fact that her daughter had her husband's baby. This triggered first amendment protection.

In **Ross v. Midwest Communications, Inc.**, 870 F.2d 271 (5th Cir. 1989), the defendant disclosed the identity of a rape victim in a documentary about a convicted rapist. The 5th Circuit affirmed summary denial of the victim's privacy claim on first amendment grounds. As in **Campbell**, the rape victim argued that the public interest did not justify disclosure of her identity. Once again, the 5th Circuit rejected the argument. Noting that "loss of credibility comes with anonymity" and that "numbers... are easily forgotten... and... have less impact", the court concluded that disclosure of the victim's identity strengthened the impact and credibility of the program. That rendered the disclosure privileged as a matter of law. Quoting **Gilbert v. Medical Economics Co.**, 665 F.2d 305, 308 (10th Cir. 1981), the court added that disclosures of identity "obviate any impression that the problems... are remote or hypothetical, thus providing an aura of immediacy and... urgency." Id.[6]

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[6]See also, **Dresbach v. Doubleday & Co., Inc.**, 518 F.Supp. 1285, 1287 (D.D.C. 1981), another autobiography/privacy case that the Texas court discusses at length. 857 S.W.2d at 706.

The same considerations protect Miriam Booher's decision to reveal her identity.

D. Booher Did Not Waive Her Rights

Petitioners argue for the first time that Miriam Booher waived her right to share her experience by "pledging" not to do so. However, the record contains no evidence of any such promise; let alone, an enforceable promise.

Moreover, the "waiver" argument was never raised at trial or on appeal. Accordingly, the Texas trial and appellate courts had no occasion or authority to consider the "waiver" argument. **San Jacinto River Auth. v. Duke**, 783 S.W.2d 209, 210 (Tex. 1990)(appellate court may not reverse summary judgment on grounds raised sua sponte); **City of Houston v. Clear Creek Basin Auth.**, 589 S.W.2d 671, 676 (Tex. 1979)(issues not expressly presented to trial court in writing cannot be considered on appeal). And as stated in **Youakim v. Miller**, 425 U.S. 231, 234 (1976), "this Court does not decide questions not raised or resolved in the lower court."

E. Conclusion: Free Speech Prevails

Miriam Booher shared her own experience coping with incest in her family. She revealed no name but her own. She disclosed that the rapist had never been brought to justice and was still a police officer. The question is whether she had a constitutional right to speak without concealing her identity.

The answer is "Yes". The first amendment protects Miriam Booher because she disclosed information of public interest that was true and lawfully obtained. **The Florida Star v. B.J.F.**, 491 U.S. 524 (1989). Incest is a matter of public interest, as are the efforts of victims and family

members to cope with it. Miriam Booher's undisguised appearance enhanced the program's credibility and impact, as well as its central theme that secrecy is the culprit. That was her constitutional right.

Public interest aside, the first amendment protects Miriam Booher's right to talk about intimate details of her life and events that impacted on it. This includes the right to say: "I am Miriam Booher. My husband raped my daughter."

The Texas courts had every opportunity to declare that some state interest was of sufficient magnitude to override the federal interest in free speech. Their refusal to do so should be dispositive.

Finally, petitioners ignore the fact that Miriam Booher's disclosure led to identification and removal of a rapist from the Arkansas police force. In the Texas courts, petitioners dismissed this as "incidental" and an unintended fluke. However, Miriam's original letter to Donahue stated that William Booher, Sr. was a police officer, and Donahue himself pointedly asked during the program: "Whatever happened to your ex-husband?" (Tr. 121). There was no fluke and the result was hardly "incidental". Moreover, truthful disclosure of matters of public interest is protected regardless of motive. **Hustler Magazine v. Falwell**, 485 U.S. 46 (1988). We share a fundamental faith that the free flow of ideas, especially when true, promotes the interest of society. The wisdom of this faith is reflected in the removal of the rapist from the police force.

At the outset, we noted that no woman ever faced liability for disclosing that her husband raped her daughter. For the reasons advanced, Miriam Booher should not be the first.

II. THE TEXAS JUDGMENT IS CONSISTENT WITH THIS COURT'S RULINGS

Petitioners argue that the Texas judgment conflicts with **Florida Star v. B.J.F.** However, the argument misconstrues the Texas judgment and **Florida Star**.

A. Petitioners Misconstrue The Scope Of The Texas Ruling

Petitioners falsely claim that the Texas ruling creates an absolute privilege to disclose "any firsthand knowledge about anyone". The Texas court said no such thing. Having created a "strawman", petitioners proceed to destroy it by observing that it would permit 1) rapists to publicize the names of their victims, 2) doctors to disclose those who test HIV-positive, 3) employees to disclose trade secrets, 4) lawyers to violate "gag" orders, 5) professors to brag about having sex with a particular student, and 6) settling parties to violate confidentiality agreements.

However, the Texas ruling did not even remotely address any of these situations. Instead, the Texas court faced a unique situation that required it to balance the federal interest in free speech with the Texas interest in privacy and freedom from embarrassment. The specific question presented concerned a mother's right to speak of the incestuous rape of her daughter, the mother's reaction to that tragedy, its impact on her life, the birth of the child of that rape, adopting and raising that child, and her eventual discovery of the truth about her husband. And with respect to that particular situation (which no court has ever addressed), the Texas court ruled in favor of free speech.

Petitioners also argue for the first time that the Texas court's "absolute privilege" abridges their constitutional right

of privacy. We do not understand the argument, but two things are clear. First, the argument is based on a false caricature of the Texas court's ruling. Second, petitioners never suggested at trial or on appeal that their constitutional right of privacy was at stake. It is too late to raise that argument now.

B. Petitioners Misconstrue "Florida Star"

There are two basic differences between this case and **Florida Star**. First, in **Florida Star**, the private fact was revealed by one who had no connection with the story other than to report it. Miriam Booher's intimate involvement in her story presents an issue not addressed in **Florida Star**.

Second, **Florida Star** addressed a state effort to override federal interests and punish protected speech. There, this Court established constitutional requirements for punishment. Specifically, the state must demonstrate an interest of sufficient magnitude to override the federal interest in free speech, and it must show that the basis for punishment is narrowly tailored to serve that state interest.

However, this case involves no state effort to punish speech; hence, there is no issue of whether the state met constitutional requirements for punishment. The Texas court simply determined that, with respect to this particular case, no Texas interest in privacy or freedom from distress outweighed the federal interest in free speech. Nothing in **Florida Star** required the Texas court to do otherwise.

III. EVEN IF THE TEXAS ANALYSIS IS FLAWED, THERE IS NO COMPELLING REASON TO GRANT WRIT

A. The Facts Are Unique And There Is No Conflict Of Opinion

As this Court has stated, it does not sit for the benefit of particular litigants or to resolve academic issues. **Rice v. Sioux City Cemetery, Inc.**, 349 U.S. 70, 74 (1955)("special and important reasons" for granting writ imply a problem beyond the academic or episodic). Because this Court's adjudicatory resources are scarce, certiorari should not be granted except to resolve issues of public importance or to resolve embarrassing conflicts of opinion among the states' highest courts or the federal circuit courts. **Layne & Bowler Corp. v. Western Well Works, Inc.**, 261 U.S. 387, 393 (1923).

This Court has more pressing matters than to fashion remedies for daughters embarrassed by mothers. And there is no conflict of opinion in this regard, for the present case is the only one to address the issue.

B. Federal Rights Were Vindicated

The fact that the Texas court vindicated a first amendment right, thereby upholding a federal interest over a state interest, provides another reason to deny writ. As Justice Stevens (dissenting) explained in **Delaware v. Van Arsdall**, 475 U.S. 673, 690-708 (1986), the primary role of this Court is to make sure that persons who seek to vindicate federal rights are fairly heard. Accordingly, the need to review state decisions that uphold federal rights is secondary to the need to scrutinize judgments disparaging those rights.

C. The Texas Court Could Have Ruled On State Law Before Reaching The First Amendment

In this case, all respondents moved for summary judgment on grounds that the essential elements of the alleged torts were negated, and on grounds that Booher's speech was protected by art. I, § 8 of the Texas Constitution. (Tr. 940-948). These arguments were reiterated throughout the Texas appellate process.

Specifically, Booher argued that Texas has yet to adopt the tort of publication of private facts and ought to reject it; further, that even if the tort was adopted, dismissal would be appropriate because the facts disclosed were widely known and no longer private. As for the tort of intentional infliction of emotional distress, Booher noted, among other things, that the element of outrageous conduct was absent. Also, Booher argued that the Texas Constitution (art. I, §8) is more protective of speech than is the first amendment; further, that the Texas Supreme Court has based decisions on art. I, §8 without needing to reach the first amendment.

As Justice Stevens explained in **Van Arsdall**, this Court's policy is to avoid reaching federal constitutional questions if a case can be decided on other grounds. Likewise, federal district courts must decide state-law issues before reaching federal constitutional issues. State courts should be encouraged to do the same. And one way to provide encouragement is to deny writ when a state court reaches a first amendment issue without first addressing issues of state law--particularly when state law provides a promising basis for disposition.

D. Petitioners Propose No Legal Principle

Though petitioners reject what they perceive the Texas court's holding to be, they propose no legal principle that would ever permit summary vindication of first amendment rights in this type of case. Their briefs to the Texas courts suggested that there should be no such legal principle; rather, juries should decide whether a parent's true but embarrassing statements about family matters are of sufficient public concern to merit protection. This is a sure way to open the litigation floodgate, chill free speech and erode constitutional rights. In light of this alternative, the decision of the Texas court should stand. As Justice Douglas stated in **Time, Inc. v. Hill**, 385 U.S. 374 (1967):

> A trial is a chancy thing, no matter what safeguards are provided. To let a jury on this record return a verdict or not as it chooses is to let First Amendment rights ride on capricious or whimsical circumstances for emotions and prejudices often do carry the day.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

KENNETH J. BOWER
(Counsel of Record)
JAMES B. GALBRAITH
McLeod, Alexander, Powel & Apffel, P.C.
802 Rosenberg; P.O. Box 629
Galveston, Texas 77553
409-763-2481

Attorneys for Respondent
Miriam Booher

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No. 93-1585

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

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individually and as next friends of WILLIAM BOOHER, Jr.,
Petitioners,
v.
PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLOW, KTRK, INC. D/B/A KTRK-TV, and MIRIAM BOOHER,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

PETITIONERS' REPLY MEMORANDUM

David H. Berg
Counsel of Record
Berg & Androphy
3704 Travis
Houston, TX 77002
713-524-5622

Philip D. Zelikow
79 J.F.K. Street
Cambridge, MA 02138
Counsel for Petitioners

ALPHA LAW BRIEF COMPANY • HOUSTON, TEXAS • (713) 981-9000 • 1-800-981-9001

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PETITIONERS' REPLY MEMORANDUM

Respondent's Briefs in Opposition offer their version of the First Amendment law and the facts. This Reply Memorandum will discuss only four new points raised by Respondents that are material to a legal judgment on the Petition.

First, Respondents claim there is "no evidence" Booher promised not to publicize her daughter's rape. (Brief for Respondent Donahue, 11). But, in fact, Booher did promise to keep quiet; she expressly agreed not to go on the Donahue Show, where she ultimately made the only public disclosure in this case. Petitioner Nancy Anonsen testified in her deposition:

> A: My mother told me that she had a chance to go on the Donahue Show. ...She asked me to go on the show with her. We discussed it. I told her I wouldn't go on the show with her. I didn't how I could possibly help anybody by doing that. That it would hurt too many people. She then told me that she agreed with me. That I was right. And that she called the Donahue people and told them that she wouldn't be on their show.
>
> Q: That's what she said?
>
> A: That's what she said to me.

(Tr. 1261) Petitioners' account must be taken as true, since the case appeals from a summary judgment. Petitioners did not just rely on the promissory estoppel theory in *Cohen v. Cowles Media*, 111 S.Ct. 2513 (1991) to defeat Booher's supposed First Amendment right to disclose, but that theory is certainly presented by the record.

Respondent's fallback argument was that the estoppel argument from *Cohen v. Cowles Media* presented a new dimension to the First Amendment argument addressed by the Texas court. But the Texas court recognized that Booher had agreed to her daughter's plea not to go on Donahue and told her daughter she would not appear. (App. 7a) Moreover, this Court has long recognized that "parties are not confined here to the same arguments which were advanced in courts below upon a Federal question there discussed." *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899). Indeed, the very case cited by Respondents, *Illinois v. Gates*, 462 U.S. 213 (1983) quoted the principle that applies here, endorsing arguments "so connected with [the original claim] in substance as to form but another ground or

reason for alleging the invalidity of the personal judgment." *Dewey v. Des Moines*, 173 U.S. at 197-98, quoted in *Illinois v. Gates*, 462 U.S. at 223.

Second, all Respondents argue that this Court should not reach the federal question because of an adequate and independent state ground for decision. This is a surprising argument. Not only did the Texas court not rule on the state grounds favored by Respondents, the Texas court did not even *cite* the Texas constitution in its opinion. We are left with the "elementary rule" that if the federal question was taken up and addressed on the merits by the state court this Court's jurisdictional concern disappears. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); see *Cohen v. Cowles Media*, 111 S.Ct. at 2517; *Franks v. Delaware*, 438 U.S. 154, 161-62 (1978).

Third, Respondent Booher claims, "Petitioners falsely state that Miriam never reported the rape to the police before the Donahue program." (Respondent Booher Brief, 3) We are content to let the police speak for themselves on this point. According to a 1989 police report prepared after the Donahue broadcast and made part of this record, Investigator Mary Margaret Kesterson learned of the rape from Nancy in 1980, confronted Booher and asked her:

> ...if she had done anything about it or if she wanted to. ...Booher responded that she had not done anything about it nor did she want to do anything. Investigator Kesterson related that she told Mickey Booher it was not too late but that Mickey Booher did not want to talk about any details and did not want to do anything about it.

(Tr. 1111) Six years later Booher told the director of the Arkansas State Police, who had heard the same rumor, that "she would not be a witness, she didn't want anything done." (Tr. 134)

Fourth and finally, Respondents argue for the first time that *Butterworth v. Smith*, 494 U.S. 624 (1990) controls the holding of this case. In that case this Court held that a grand jury witness could tell about the corruption he had recounted to a grand jury. That case turned on a finding of inadequate state interest to support the categorical prohibition in the overbroad Florida law, especially to suppress speech about governmental misconduct, the "core of the First Amendment." 494 U.S. at 630-34. But this Court has already found it "undeniable" that the states' interest in protecting the identities of victims of sexual offenses from disclosure "are highly significant interests." *Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989). Petitioners, in their Petition, accepted and met the burden of showing how their approach, unlike the Florida prohibition, was tailored to protect these significant state interests while respecting First Amendment concerns. (Petition, 23-25)

Respectfully submitted,

David H. Berg
Counsel of Record
Berg & Androphy
3704 Travis
Houston, TX 77002
713-524-5622

Philip D. Zelikow
79 J.F.K. Street
Cambridge, MA 02138

Counsel for Petitioners

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Petitioners,

vs.

PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLOW, KTRK, INC. D/B/A KTRK-TV, and MIRIAM BOOHER,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Roger James George, Jr.*
Julie A. Ford
Peter D. Kennedy
GEORGE, DONALDSON & FORD, L.L.P.
114 W. 7th Street, Suite 1000
Austin, Texas 78701
(512) 495-1400; Fax: (512) 499-0094

Attorneys for Respondents PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLOW and KTRK, INC. d/b/a KTRK-TV

*Counsel of Record for Respondents

May 5, 1994

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QUESTIONS PRESENTED

1. Is the judgment of the Texas Court of Appeals, First District, consistent with this Court's precedents, or does it conflict with the decisions of this Court?

2. Does the judgment of the Texas Court of Appeals, First District, precluding tort liability for an individual's voluntary discussion of true facts of legitimate public concern about her own life, present an important and substantial federal question that this Court needs to address?

3. Is there a parallel, adequate and controlling state law ground supporting the judgment of the Texas Court of Appeals, First District, that makes this an unsuitable case for this Court's review?

LIST OF PARTIES

PETITIONERS:

Nancy Anonsen and Michael Anonsen, individually and as next friends of William Booher, Jr., a Minor

COUNSEL FOR PETITIONERS:
David H. Berg
Berg & Androphy
3704 Travis
Houston, Texas 77002

Philip D. Zelikow
79 J.F.K. Street
Cambridge, MA 02138

RESPONDENTS:

Phil Donahue
Multimedia Entertainment, Inc.
Multimedia, Inc.
Jose Pretlow
KTRK, Inc. d/b/a KTRK TV

COUNSEL FOR RESPONDENTS DONAHUE, et al.:
Roger James George, Jr.
Julie A. Ford
Peter D. Kennedy
GEORGE, DONALDSON & FORD, L.L.P.
114 W. 7th Street, Suite 1000
Austin, Texas 78701

Miriam Booher

COUNSEL FOR RESPONDENT BOOHER:

James B. Galbraith
Otto D. Hewitt, III
Kenneth J. Bower
McLeod, Alexander, Powel & Apffel, P.C.
802 Rosenberg Street
Galveston, Texas 77553

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No. 93-1585

In The

Supreme Court of the United States

October Term, 1993

NANCY ANONSEN and MICHAEL ANONSEN,
individually and as next friends of WILLIAM BOOHER, JR.,
Petitioners,

vs.

PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLOW, KTRK, INC. D/B/A KTRK-TV, and MIRIAM BOOHER,
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On Petition for a Writ of Certiorari to the
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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATE COURT OPINIONS

The Petitioners failed to include in their Petition for a Writ of Certiorari ("Petition") the letter opinion of District Judge I. Allan Lerner, 56th Judicial District. In granting summary judgment for Respondents, Judge Lerner decided the entire case on state law grounds, without reaching any federal issue. Respondents have included this letter opinion in the attached Appendix ("App.").

JURISDICTION

Respondents do not challenge this Court's jurisdiction under 28 U.S.C. § 1257(a) to consider this Petition.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Texas has adopted the Restatement of Torts (Second) § 652D definition of the tort of invasion of privacy through publication of private, embarrassing facts. It reads:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

Restatement (Second) of Torts § 652D.

Respondents relied in state court in part upon the free speech provision of the Texas Constitution, which reads in relevant part:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. ...

Tex. Const. art. I, § 8.

This case also involves the First and Fourteenth Amendments to the United States Constitution, which read in relevant part:

> Congress shall make no law ... abridging the freedom of speech, or of the press ... .

U.S. Const. amend. I.

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ... .

U.S. Const. amend. XIV, § 2.

STATEMENT OF THE CASE

The Proceedings in the District Court and Court of Appeals

Judge I. Allan Lerner, 56th District Court, granted all defendants summary judgment. In his letter opinion Judge Lerner held that, as a matter of Texas law, Petitioners failed to establish the essential element of their claim that Ms. Booher's undisguised discussion of her family life on the *Donahue Show* was *not* a matter of legitimate public concern. App. at 2-3. Because the Petitioners could not prove an essential element of the tort, the District Court ruled that Respondents were entitled to summary judgment.

The District Judge also ruled that Texas law provided Nancy Anonsen's husband, Petitioner Michael Anonsen, no cause of action for the alleged invasion of privacy of his wife. App. at 5. He further held that Petitioners' claims for

intentional infliction of emotional distress failed because the Respondents' conduct was not "extreme and outrageous" as required by Texas law. App. at 5.

The Court of Appeals, First District, affirmed Judge Lerner's judgment in an opinion reported at 857 S.W.2d 700 and included in the Petitioners' Appendix at 5a.

The Texas Supreme Court denied discretionary review. Petition at 19-22a.

Statement of Facts

The Texas Court of Appeals' opinion adequately states the facts as they are to be considered in reviewing the affirmance of a grant of summary judgment. However, because Petitioners have gone beyond that opinion, and beyond what the record supports, Respondents briefly re-state the facts.

Miriam Booher appeared undisguised on the *Donahue Show* in January 1989, and talked about how incest and rape, the topic of that broadcast, had affected her life and her family. Ms. Booher opened the show by describing her experience raising a child born of incest. Her 12-year old daughter had given birth to a son, and Ms. Booher and her husband adopted and raised the boy as their own. Five years later Ms. Booher learned that the biological father of the boy was her own husband. On the program, Ms. Booher discussed her decision to remain in the marriage even after discovering this fact, and she explained her failure to report the crime at that time was because her husband himself was a police officer. Tr. 113-21.

At each stage in this case, Petitioners have used increasingly vehement language to demonize Ms. Booher. Petitioners now call Ms. Booher "one of the victimizers" and actually charge her with *criminal* conduct. Petition at 11,

12. The record refutes these caustic accusations. The Texas Court of Appeals understood that Ms. Booher, "like her daughter and grandson, is herself one of the victims of the family tragedy of incest." 857 S.W.2d at 705.

As the Court of Appeals noted, Ms. Booher explained that upon learning the truth, she ordered her husband to leave, but reconciled with him due to economic hardship while maintaining physical separation from him. 857 S.W.2d at 702. Foreign-born and unable to read or write English, she could only obtain menial jobs, and she (rightly) feared for the welfare of her children. *Id.* Ms. Booher did not formally report the crime to the authorities because her husband, an Arkansas State Trooper, continually reminded her that *he was* "the law" in the small Arkansas towns where they lived. Tr. 121. However, employees of the Arkansas State Police, including its director, were aware of the rape and incest. No action was taken; no investigation was pursued. Tr. 134-35. After the boy learned the truth, the need for pretense vanished, and later Ms. Booher and her husband separated and were divorced. 857 S.W.2d at 702.

With the help of her son, Petitioner William Booher, Jr., Ms. Booher wrote a letter to Phil Donahue about her family's experience with incest. Tr. 116-21. Appearing on the *Donahue Show*, Ms. Booher described these events in her own life without using the names of her daughter, her husband, or her adopted son (and biological grandson). She did not reveal where any of her family lived, nor did she describe any of the acts of incest which her daughter suffered. Tr. 113-21.

Several other rape and incest survivors appeared on the show to discuss the repercussions for victims and family members when children are born as a result. A clinical psychologist also appeared. The show dealt at length with the need for public awareness and recognition of incest, which is necessary to allow victims to recover from the

shame and psychological trauma associated with this too-often hidden crime. As Mr. Donahue stated, "Secrecy is the great accomplice here." Tr. 120. Soon after the broadcast, and as a direct result of it, State Trooper Bill Booher, who never denied the incest, was finally forced to resign. Tr. 144-48, 159-60, 168, 171-82.

Plaintiffs misstate the record by claiming that Mr. Donahue admitted "sensationalizing" his shows. Petition at 4. Mr. Donahue said no such thing. He conceded that his show faced competition and that part of his audience expects to be entertained as well as be informed, but he adamantly denied that he compromised his journalistic standards in any way in response to competition. 2d Supp. Tr. 119-21, 226-34.

Nor did Mr. Donahue admit that he "violated his own standards" in this program, as Petitioners for the first time now claim. Petition at 5. In fact, Mr. Donahue explained that he would allow a parent to discuss the rape of a child, and would presume, in the absence of contrary indications, that the parent had the child's consent. Tr. 134-35.

Finally, there is simply no support in the record for the Petitioners' assertion, made now for the first time, that Ms. Booher made "repeated and express pledges of confidentiality to petitioners." Petition at 5. Ms. Booher at one point had "told [Nancy] Anonsen that she had cancelled her plans to appear." 857 S.W.2d at 702; Tr. at 1261. There is no evidence of a pledge of confidentiality, a promise, or an agreement; only a single statement of her current intention not to appear. Tr. 1261. Nor is there *any* evidence the Donahue Respondents knew of Ms. Booher's statement to her daughter, let alone any "express pledge of confidentiality."

REASONS FOR DENYING THE WRIT

I.

THE TEXAS COURT OF APPEALS' JUDGMENT DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

The Texas Court of Appeals' decision affirms the unremarkable proposition that Texas common law cannot impose tort liability for the disclosure of true information about oneself that is of legitimate public concern, even if as a consequence private information about others might be revealed. Petitioners ask this Court to review and reverse the judgment, so they may pursue actual and punitive damages based on a wholly novel proposition: liability against their own mother, for telling the truth about a tragedy that happened to herself and her family -- a revelation that finally caused an Arkansas State Trooper who had committed rape and incest to resign. This Court has never yet sanctioned the imposition of civil liability for the publication of truthful information on an invasion of privacy theory, *see Florida Star v B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603, 2605-06, 105 L. Ed.2d 443 (1989), and this is not a suitable case to consider the possibility.

In fact, this Court recently recognized a person's right truthfully to discuss important events in his own life, even if it might disclose information embarrassing to others. In *Butterworth v. Smith*, 494 U.S. 624, 110 S. Ct. 1376, 108 L. Ed.2d 572 (1990), this Court reviewed a Florida statute that prohibited a reporter from recounting his experience testifying before a grand jury, even though the grand jury had completed its investigation. The State argued that the need for grand jury secrecy continued, because those who were investigated but not indicted by the grand jury might be embarrassed by the reporter's disclosures. Nonetheless,

Chief Justice Rehnquist, for a unanimous Court, wrote:

> [E]ven in those situations where the disclosure by the witness of his own testimony could have the effect of revealing the names of persons who had been targeted by the grand jury but exonerated, our decisions establish that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech.

494 U.S. at 634, 110 S. Ct. at 1382.

The Petitioners do not mention *Butterworth*, and do not claim that the Texas Court of Appeals' *judgment* conflicts with any ruling by this Court. Rather, they now argue at length that the opinion's *language* is inconsistent with this Court's approach in *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed.2d 443 (1989). Petition at 6-25. "This Court, however, reviews *judgments*, not *statements in opinions*," *California v. Rooney*, 483 U.S. 307, 311, 107 S. Ct. 2852, 2854, 97 L. Ed.2d 258 (1987) (emphasis added), or it would forever be correcting language it might not have chosen. The Petitioner made no argument based on *Florida Star* in State court, and never claimed that it controlled the outcome. Because the Petitioner never made the *Florida Star* argument it now makes, this Court should not grant review to consider it now. *Illinois v. Gates*, 462 U.S. 213, 217-24, 103 S. Ct. 2317, 2321-25, 76 L. Ed.2d 527 (1983) (refusing to consider grounds asserted by State, for the first time on petition to Supreme Court, for reversing the state court's recognition of respondent's constitutional rights).

In any case, the Court of Appeal's judgment is entirely consistent with *Florida Star*. There, this Court held that a newspaper's publication of a rape victim's name obtained from government records was constitutionally

protected from an invasion of privacy suit. Here, the Texas Court of Appeals has similarly refused to impose liability for a woman's voluntary disclosure of the story of her own life.

This outcome is compatible with this Court's other privacy decisions as well. In the absence of an enforceable confidentiality agreement, this Court has consistently rejected liability against a person for the "truthful statement of information he acquired on his own." *Butterworth*, 494 U.S. at 635, 110 S. Ct. at 1383.

For example, in *Cox Broadcasting v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed.2d 328 (1975), this Court held that a television station could not be held liable for broadcasting the name of a rape-murder victim which had been obtained from courthouse records. In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed.2d 399 (1979), this Court held that the First Amendment precludes punishing a newspaper for publishing a juvenile offender's name when the name was legally obtained. In *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 97 S. Ct. 1045, 51 L. Ed.2d 355 (1977), it held that a State cannot constitutionally enjoin the publication of a juvenile offender's name, and in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed.2d 1 (1978), that a State could not convict for publishing information obtained from a state judicial review commission.

Because the Petitioner cannot show any conflict between the Texas Court of Appeals' ruling and decisions of this Court, this Court should deny review.

II.

THE PETITIONERS' ATTEMPT TO CREATE AN IMPORTANT FEDERAL QUESTION DISTORTS THE COURT OF APPEALS' DECISION, THE RECORD, AND THE LAW.

Petitioners greatly exaggerate the breadth and impact of the Texas Court of Appeals' decision in claiming that its "language is unlimited" and that it has "eliminated the tort of public disclosure of private facts." Petition at 7. Petitioners ignore that this Court does not review the *language* of state court opinions, but rather their *judgments*. *Rooney*, 483 U.S. at 311, 107 S. Ct. at 2854.

The holding at issue is narrow: Ms. Booher could appear undisguised on television to discuss the consequences of her husband's crime, without fearing civil liability. There is ample record support that not only are incest and rape of legitimate public concern (especially when committed by a State Trooper), but also that personal identification increases a speaker's legitimacy and helps defeat the true accomplice of incest: shame and secrecy. Tr. 186-87.

The Texas Court of Appeals' ruling does no more than protect a person's right to speak freely of such serious matters. The ruling says nothing about disclosures of matters *not* of legitimate public concern. Nor does it protect gratuitous disclosures outside the context of meaningful discourse, let alone the disclosure of private information in violation of an enforceable agreement. The Court specifically stated that its ruling was confined to the "particular facts and circumstances of this case." 857 S.W.2d at 704.

The Court of Appeals' decision is actually *narrower* than many other decisions, because Ms. Booher disclosed

information about *herself*, while courts regularly uphold the right to disclose information about *others*.[1] There is nothing shocking about a holding that Ms. Booher is entitled to tell her own story without wearing a mask. The contrary holding *would* be astonishing: a ruling that Ms. Booher would have to disguise herself to appear on the *Donahue Show*, and must write her autobiography anonymously. 857 S.W.2d at 706.

For the first time ever, the Petitioners now claim that Ms. Booher violated "repeated and express pledges of confidentiality to petitioners." Petition at 5. The Petitioners did not raise this argument before the Texas District Court, Court of Appeals, or Supreme Court, either by pleading such an agreement or even mentioning it in their numerous briefs, perhaps because the record discloses *no* evidence of any enforceable "pledge of confidentiality." There is simply no record support for the Petitioners' newfound reliance on *Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed.2d 586 (1991).

Even if there was record support, this Court cannot grant certiorari to review an issue never presented or decided in State court. *Illinois v. Gates*, 462 U.S. 213, 217-24, 103 S. Ct. 2317, 2321-25, 76 L. Ed.2d 527 (1983). State courts are to be given the first opportunity at resolving such questions, even of federal law. *Id.*

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[1] *E.g.*, *Cape Publications v. Bridges*, 423 So.2d 426 (Fla. App. 1982), *cert. denied*, 464 U.S. 893 (1983); *Hubbard v. Journal Publishing Co.*, 368 P.2d 147 (N.M. 1962); *Howard v. Des Moines Register*, 283 N.W.2d 289 (Iowa 1979); *Meetze v. Associated Press*, 95 S.E.2d 606 (S.C. 1956); *Bremmer v. Journal-Tribune Publishing Co.*, 76 N.W.2d 762 (Iowa 1956).

And even if there had been an enforceable "pledge," and even if Petitioners *had* raised this "pledge" issue in state court and had it decided, there is no record or legal support for binding Respondents Phil Donahue, Jose Pretlow, Multimedia, or KTRK-TV to such a pledge. Even now, the Petitioners do not try to claim that any of these Respondents were party to or were even aware of any such "pledge." Because these Respondents never made any agreement restricting their right to publish truthful information, *Cohen* cannot apply.

Petitioners' argument is further confused by their fundamental misunderstanding of the nature of First Amendment rights. Petitioners claim that "If Booher had publicized her allegations without any help from Donahue, she would have had no constitutional protection at all." Petition at 10. This of course is entirely mistaken; individual citizens need not resort to the press to have First Amendment rights. *E.g., Organization for a Better Austin v. O'Keefe*, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed.2d 1 (1971) (First Amendment applies to individual pamphleteers); *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253 (Tex. 1983) (lone picketers have First Amendment rights).

This Court should preserve its limited number of writs for cases that present clearly articulated important questions of federal law definitively raised by the record. Petitioners do not present such a case, and this Court should not grant review.

III.

THIS CASE DOES NOT IN FACT PRESENT AN IMPORTANT *FEDERAL* QUESTION FOR THIS COURT TO RESOLVE.

The importance of any federal law issue reached by the Texas Court of Appeals is greatly diluted by the presence of a parallel, adequate, and controlling issue of Texas law. At each level in state court, the key issue addressed by both sides was whether Ms. Booher's appearance on the *Donahue Show*, particularly her *undisguised* appearance, was a matter of legitimate concern to the public. Proof that it was *not* of legitimate interest was an essential element of the Petitioner's state law cause of action. Adopting Section 652D of the Restatement (Second) of Torts, the Texas Supreme Court held that to recover for the tortious disclosure of private facts, a plaintiff must show:

> (1) that publicity was given to matters concerning his private life,
>
> (2) the publication of which would be highly offensive to a reasonable person, and
>
> (3) that the matter publicized is not of legitimate public concern.

Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 682 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977). Texas law simply provides no remedy for the publication of true facts of legitimate public interest.

Texas courts, and federal courts applying Texas law, have repeatedly recognized the common law nature of this

third element. *See, e.g., Industrial Foundation of the South*, 540 S.W.2d at 682; *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 275 (5th Cir. 1989). The main cases relied upon by the Texas Court of Appeals in this case, in fact, *Ross*, above, and *Dresbach v. Doubleday & Co., Inc.*, 518 F. Supp. 1285, 1287 (D.D.C. 1981), treat this question, as have many other cases, as one of common law, not constitutional law.[2]

No doubt, courts have recognized a parallel constitutional privilege. *E.g. Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980). The state law tort element of "no legitimate public concern" are grounded on free speech principles, but its interpretation and application is initially a matter of state law. Where non-constitutional grounds exist, this Court refuses to reach constitutional implications. *Lying v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S. Ct. 1319, 1321, 99 L. Ed.2d 534 (1988). Where a state law element adequately insures rights concomitantly protected by federal law, there is no pressing need for this Court to explore the scope of the federal right.

Surely, the Court of Appeals' opinion does speak in terms of Ms. Booher's "*right* to reveal her identity in telling the story of her experience." 857 S.W.2d at 705 (emphasis added). It seems hard to imagine how she could lack that right. Just as surely, the Texas Court of Appeals' recognition of that right was bounded by the context of Ms.

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[2]*E.g., Howard v. Des Moines Register*, 283 N.W.2d 289 (Iowa 1979); *Hubbard v. Journal Publishing Co.*, 368 P.2d 147, 148 (N.M. 1962); *Buzinski v. Doall Company*, 175 N.E.2d 577, 579 (Ill. App. 1961); *Meetze v. Associated Press*, 95 S.E.2d 606, 609 (S.C. 1956); *Bremmer v. Journal-Tribune Publishing Co.*, 76 N.W.2d 762, 765 (Iowa 1956).

Booher's appearance on a show that seriously addressed the issues Ms. Booher was raising: "we find the analysis of the third element of the tort [the publicizing of matters not of legitimate public concern] to be dispositive of the appeal." 857 S.W.2d at 703.

Petitioners never argued that rape and incest are not matters of legitimate public concern, but only that Miriam Booher's *identity* was not important to her story. However, the record fully supports the conclusion accepted by Judge Lerner that her undisguised appearance had serious value in legitimizing her story, and in defeating the veil of secrecy and shame that has too often kept incest a dirty family secret. Tr. 186-87; App. at 3.

This Texas common law element means that little could be achieved by this Court's granting review. Whatever the scope of federally-guaranteed rights, Texas law will require proof that the matter disclosed lacked legitimate concern to the public. The existence of non-constitutional grounds which alone might have served as an adequate ground for disposition of the case is a ground for not reaching the constitutional issue at all. *Alma Motor Co. v. Temken-Detroit Axle Co.*, 329 U.S. 129, 67 S. Ct. 231, 91 L. Ed. 128 (1946).

This significant overlap between state tort law and federal constitutional privileges, plus the fact that the Texas Court of Appeals, First District, *protected* a citizen's right to speak rather than restricted it, *Michigan v. Long*, 463 U.S. 1032, 1067-68, 103 S. Ct. 3469, 3490-91, 77 L. Ed.2d 1201 (1983) (Stevens, J., dissenting), means that this would not be a meaningful case for this Court to review. If and when this Court is presented with a state court judgment that finds the constitutional privilege for publications of public concern to be lacking, the need for review arguably would be stronger.

IV.

THE TEXAS COURT OF APPEALS' JUDGMENT IS SUPPORTED BY OTHER ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

Much of the Texas Court of Appeals' judgment can be supported on state law grounds, making this Court's review of the case even less important. These sufficient grounds of state law mean that this Court's review would have no effect on the final judgment.

1. Petitioner Michael Anonsen has no cause of action.

Judge Lerner held that Texas law provided Petitioner Michael Anonsen no cause of action for the alleged invasion of his wife's privacy. App. at 5. *See Moore v. Charles B. Pierce Film Enterprises, Inc.*, 589 S.W.2d 489 (Tex. Civ. App.--Texarkana 1979, writ ref'd n.r.e.) (brother cannot recover for alleged invasion of privacy of sibling); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1093 (5th Cir. 1984) (Texas law does not permit recovery by husband for invasion of privacy of wife), *cert. denied*, 469 U.S. 1107 (1985). Although the Court of Appeals did not reach the issue, Petitioner made no argument before the Court of Appeals that would justify a different outcome on remand.

2. Texas law bars Petitioners' "infliction of emotional distress" claims.

Petitioners' related tort claim of "negligent infliction of emotional distress" has been eliminated by the Texas Supreme Court. *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993); *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993). Further, their claim of "intentional infliction of emotional

distress" was disposed of by the District Court on state law grounds, because they failed to show that the Respondents' actions were "extreme and outrageous." App. at 5. Again, a remand could not change the result as to these claims.

CONCLUSION

For the reasons stated above, this Court should deny the Petitioners' Petition for a writ of certiorari to the Texas Court of Appeals, First District.

Respectfully submitted,

Roger James George, Jr.*
Julie A. Ford
Peter D. Kennedy
GEORGE, DONALDSON & FORD, L.L.P.
114 W. 7th Street, Suite 1000
Austin, Texas 78701
(512) 495-1400

COUNSEL FOR PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLOW, and KTRK, INC. D/B/A KTRK-TV, RESPONDENTS

Counsel of Record

APPENDIX

56th District Court
Galveston County
GALVESTON, TEXAS 77550
COUNTY COURTHOUSE

I. ALLAN LERNER
JUDGE

January 23, 1991

Mr. R. James George, Jr.
Graves, Dougherty, Hearon & Moody
2500 NCNB Tower
P. O. Box 98
Austin, Texas 78767

Ms. Tamera L. Kinnie
Berg & Androphy
3704 Travis Street
Houston, Texas 77002

Mr. James B. Galbraith
McLeod, Alexander, Powel & Apffel
P. O. Box 629
Galveston, Texas 77553

IN RE: CAUSE NO. 89CV0297 IN THE 56TH DISTRICT COURT
NANCY ANONSEN, ET AL VS. PHIL DONAHUE, ET AL

Dear Counsel:

In connection with the motions for summary judgment filed by all the defendants, first let me address the objections to defendants summary judgment proof. I have reviewed the objections and they generally deal with hearsay and speculation objections. Some objections are good; but even after deleting those portions of the summary judgment proof I believe that the summary judgment evidence shows without dispute that 1) a substantial number of people knew that Nancy Anonsen was the adopted daughter of William Booher prior to the broadcast in

question and, 2) that William Booher would not have resigned his position with the Arkansas State Police but for the broadcast. However, as later indicated herein, it is my judgment that neither of these matters are decisive in deciding the motions for summary judgment.

All parties agree that there is a common law cause of action in Texas for an invasion of privacy. Industrial Foundation of the South v Texas Industrial Accident Board, 540 SW2d 668. Nor do the parties disagree as to the elements of this cause of action as set out in Restatement (Second) of Torts, 652D, adopted in Industrial Foundation, supra. One of the elements which is the element in dispute herein, requires a showing that the matter publicized is not of legitimate public concern.

The parties disagree as to whether or not the question of legitimate public concern is one of fact or a question of law to be resolved by the Court.

Somewhat similar to the issue of legitimate public concern is the issue of whether a person is a "public figure" in defamation cases, and whether defamatory statements are expressions of fact or opinion. Texas Courts it appears have held these matters to be questions of law, Jacobs v McIlvan, 759 SW2d 467; Houston Chronicle Pub. Co. v Stewart, 668 SW2d 727; El Paso Times v Kerr, 706 SW2d 797. There are cases cited by the plaintiffs where the issue of legitimate public concern is held to be a fact issue for the jury. Among them are Hall v Post, 355 SE2d 819. Cases also go in the opposite direction most notably a Fifth Circuit case Ross v Midwest Communication, Inc., 870 F2 271.

As a shading of this issue it has been held that it may be in the public interest to know about some general activity (body surfing) as a matter of law, but it may be a jury question as to whether it is in public interest to know "private" facts about individuals engaged in that activity Virgil v Time, Inc., 527 F2d 1122. Also in cases of "false light" invasion of privacy cases fact issue are generally stated since there is an issue as to whether the reported facts or portrayal of the plaintiff are factually true or not. Cantrell v Forest City Pub. Co., 419 U.S. 245; Brun v Flynt, 726 F2d 245.

I am inclined to find that the issue of legitimate public concern is a question of law for the Court to decide, because of the Texas cases dealing with related matters cited above, and because of the Fifth Circuit opinion in Ross, supra. I think incest as discussed on the Donahue Show in question was an issue of legitimate public concern.

Plaintiff Nancy Anonsen's name was not disclosed on the show although Defendant Miriam Booher gave her name. Whether of not Miriam Booher's identity was integral to the topic of incest is the next issue. The plaintiffs seem to suggest that the show would have lost no credibility had Miriam Booher not disclosed her name, or should otherwise have guarded against her identity. In viewing the video this would have seemed to be impractical given the format of the show.

For the reasons stated in Ross v Midwest Communication, Inc., Supra, to gain credibility establishes the nexus in my judgment, between divulging the mother's name and legitimate public concern in incestuous relationships.

Defendants further contend that disclosing William Booher to be a State Trooper was of legitimate public concern or the nexus for disclosing his and the defendant Miriam Booher's name. However, it would appear that this was not a planned purpose for the topic to be aired and was only an incidental result thereof and not the main focus of the show. Although it may have been an unintended result of the interview it may well establish a nexus to the general topic of incest. This fact had been made known to the promoters of the show in the letter from Miriam Booher to the show's producers.

Interwoven in the issue of legitimate public concern is the issue of first amendment rights of the defendants. As stated in Dresbach v Doubleday & Co., Inc., 518 F Supp 1285,

> "However, we tread on dangerous ground deciding exactly what matters are sufficiently relevant to a subject of legitimate public interest to be privileged. First Amendment values could obviously be threatened by the uncertainty such decisions could create for writers and

> publishers. Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substitute its judgment for that of the publisher."

Dresbach at page 1290. See also Cox Broadcasting Corp v Cohn, 420 US 469; Campbell v Seabury Press, 614 F2d 395. Time, Inc v Hill, 385 US 374.

Constitutional guaranties of freedom of speech and press do not eliminate all claims for invasion of privacy but seem to leave a very narrow window allowing recovery only in cases of flagrant breaches of privacy as stated in Dresbach, supra; Cantrell v Forest City Pub. Co., 419 US 245 distinguishing Time, Inc. v Hill, 385 US 374. Examples are Hall v Post, supra. where a statute protected disclosure of adoption records; Virgil v Time, Inc., supra, where curious behavior of the body surfer was held to have no relation to the story of public concern, body surfing; Deaton v Delta Publishing Co., 326 SO2d 472 naming and showing pictures of mentally retarded children in the course of a story about special education classes. Plaintiff would argue that giving the means of identifying a victims of incest is as flagrant as the examples cited above, but my thinking is otherwise. The victims were not expressly named, they were part of the story and in my judgment the defendants were protected by first amendment constitutional considerations. What was said in Dresbach, supra might well apply here.

> "It is easy to sympathize with his objection to the Book having been written at all and certainly to his inclusion in it,"....."I asked not to be in the book. I have a right to my own privacy"....."Clearly, this society has put a higher value on open criminal proceedings and on public discussion of all issues than on the individual's right to privacy"

I find the Donahue program as presented and Mrs. Booher's participation to be of legitimate public concern as a matter of law and therefore would grant all of the defendants motions for summary judgment. Having said this it may not be

necessary to discuss other issues in the case but for whatever purpose it might serve I will try to review these other matters as well.

Defendants contend that because of the large number of people that were aware of the facts surrounding the family relationship before the broadcast in question that these facts were no longer "private". Defendants cite as principal authority for this position Porter v Channel 7 of Detroit, 17 Med. L. Rptr., 1898. Plaintiff cites Hall v Post, supra. I think at best there is a fact issue in this regard and am inclined to follow the language in Hall v Post, stating:

> "The fact that a plaintiff may have spoken freely to a small, select number of people about a private matter is not in itself a making public of the information disclosed." "There is an 'obvious and substantial difference' between this type of selective disclosure and 'the disclosure of the same facts to the public at large.'"

As to the contention that Miriam Booher as a parent of William Booher, Jr. consented as a matter of law to his adoptive mothers' disclosure of her identity on the show, there is some authority that Sec. 12.04(2) of the Family Code would authorize such consent at least as to publication of pictures of a minor. Faloona v Hustler Magazine Inc., 607 Supp 1341. The Faloona case involved a release executed by the mother and I am not prepared to hold that in effect a minor cannot sue his parent for invasion of the minor's privacy. See Jilani v. Jilani, 767 SW2d 671 where the statement is made, "other exceptions to the doctrine that a minor cannot sue his parents are recognized by some courts when the parent's actions constitute an intentional tort." See also Wallace v Wallace, 466 SW2d 416. Defendant's contention in this regard is denied.

As to the contention that Michael Anonsen has no cause of action for mental anguish because of an invasion of his wife's privacy, I think the defendants are correct under Wood v Hustler Magazine, Inc., 736 F2d 1084 where the Court states "The district court was clearly erroneous in finding that Billy suffered mental anguish for the invasion of his privacy. Texas does not permit a

plaintiff to recover for injury caused by the invasion of another's privacy."

Last is the cause of action asserted against Mrs. Booher for negligent and intentional infliction of emotional distress. Tidelands Auto Club v Waters, 699 SW2d 939. If the disclosure is protected under free speech then it cannot be the basis for a cause of action for negligent or intentional infliction of emotional damage. Deupree v Iliff, 860 F2d 300. Legitimate public concern as indicated above does involve first amendment rights. In addition an action for intentional infliction of emotional distress requires the conduct complained of to be extreme and outrageous. I find as a matter of law that the conduct complained of here by the plaintiffs was not extreme and outrageous.

Based on the foregoing I would grant all the defendants motions for summary judgment and would ask that Mr. George prepare an order to this effect and submit such proposed order to all other counsel for approval as to form.

Very truly yours,

I. Allan Lerner, Judge

IAL/ka